No. 17-1307	
Title:	**Dennis Obduskey, Petitioner** **v.** **McCarthy & Holthus LLP**
Docketed:	March 15, 2018
Lower Ct:	United States Court of Appeals for the Tenth Circuit
Case Numbers:	(16-1330)
Decision Date:	January 19, 2018
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Mar 13 2018	Petition for a writ of certiorari filed. (Response due April 16, 2018) **Petition** **Appendix** **Certificate of Word Count** **Proof of Service**
Apr 09 2018	Motion to extend the time to file a response from April 16, 2018 to May 16, 2018, submitted to The Clerk. **Main Document**
Apr 11 2018	Motion to extend the time to file a response is granted and the time is extended to and including May 16, 2018.
May 16 2018	Brief of respondents McCarthy & Holthus LLP, et al. in opposition filed. **Main Document** **Certificate of Word Count** **Proof of Service**
May 23 2018	Waiver of the 14-Day waiting period under Rule 15.5 filed by petitioner. **Main Document**
May 29 2018	DISTRIBUTED for Conference of 6/14/2018.
May 30 2018	Reply of petitioner Dennis Obduskey filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Jun 11 2018	Rescheduled.
Jun 18 2018	DISTRIBUTED for Conference of 6/21/2018.
Jun 27 2018	DISTRIBUTED for Conference of 6/27/2018.
Jun 28 2018	Petition GRANTED.

Jul 16 2018	Joint motion for an extension of time to file the opening briefs on the merits filed. **Main Document**
Jul 23 2018	Joint motion to extend the time to file the opening briefs on the merits granted. The time to file the joint appendix and petitioner's brief on the merits is extended to and including September 10, 2018. The time to file respondents' brief on the merits is extended to and including November 7, 2018.
Aug 08 2018	Blanket Consent filed by Petitioner, Dennis Obduskey. **Blanket Consent**
Sep 04 2018	Blanket Consent filed by Respondents, McCarthy & Holthus LLP, et al.. **Blanket Consent**
Sep 10 2018	Brief of petitioner Dennis Obduskey filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 10 2018	Joint appendix filed. (Statement of costs filed) **Main Document** **Proof of Service**
Sep 17 2018	Brief amicus curiae of NAACP Legal Defense & Educational Fund, INC filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 17 2018	Brief amici curiae of Members of Congress filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Sep 17 2018	Brief amicus curiae of National Consumer Law Center filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 07 2018	Brief amicus curiae of Michigan Creditors Bar Association filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Nov 07 2018	Brief of respondent McCarthy & Holthus LLP filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 13 2018	Brief amicus curiae of National Creditors Bar Association filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 13 2018	Amicus brief of Legal League 100 not accepted for filing. (November 15, 2018) (Duplicate submission)
Nov 14 2018	Brief amicus curiae of Colorado Mortgage Lenders Association filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Nov 14 2018	Brief amici curiae of United Trustee's Association, et al. filed.

	Main Document **Certificate of Word Count** **Proof of Service**
Nov 14 2018	Brief amicus curiae of United States filed. **Proof of Service** **Main Document**
Nov 14 2018	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. **Proof of Service** **Main Document**
Nov 14 2018	Brief amicus curiae of Legal League 100 filed. **Certificate of Word Count** **Proof of Service** **Main Document**
Nov 14 2018	Brief amicus curiae of The Commercial Law League of America filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 14 2018	Brief amicus curiae of USFN - America's Mortgage Banking Attorneys filed. **Main Document** **Other** **Certificate of Word Count** **Proof of Service**
Nov 14 2018	Brief amici curiae of Mortgage Bankers Association, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 28 2018	SET FOR ARGUMENT ON Monday, January 7, 2019
Nov 30 2018	CIRCULATED
Dec 03 2018	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Dec 07 2018	Reply of petitioner Dennis Obduskey filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 11 2018	Record requested from the U.S.C.A. 10th Circuit.
Dec 11 2018	Record from the U.S.C.A. 10th Circuit is electronic and located on PACER.
Jan 07 2019	Argued. For petitioner: Daniel L. Geyser, Dallas, Tex. For respondent: Kannon K. Shanmugam, Washington, D. C.; and Jonathan C. Bond, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)

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Party name: Colorado Mortgage Lenders Association

No.

In the Supreme Court of the United States

DENNIS OBDUSKEY, PETITIONER

v.

MCCARTHY & HOLTHUS LLP

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Congress passed the Fair Debt Collection Practices Act (FDCPA) to "eliminate abusive debt collection practices by debt collectors." 15 U.S.C. 1692(e). Under the FDCPA, the term "debt collector" is defined as "any person * * * who regularly collects or attempts to collect, directly or indirectly, debts owed or due * * * another." 15 U.S.C. 1692a(6).

This case presents a clear and entrenched conflict regarding whether the FDCPA applies in the foreclosure context. In the decision below, the Tenth Circuit, siding with the Ninth Circuit, held that non-judicial foreclosures are not covered by the FDCPA; in doing so, the panel acknowledged the issue has "divided the circuits," and it expressly rejected the "contrary position" of multiple courts of appeals and state high courts. This holding was the sole basis of the decision below, and it arises on the precise fact-pattern that has generated extensive "confusion" and hundreds of conflicting decisions. This case is the perfect vehicle for resolving the widespread disagreement over this important issue.

The question presented is:

Whether the FDCPA applies to non-judicial foreclosure proceedings.

PARTIES TO THE PROCEEDING BELOW

Petitioner is Dennis Obduskey, the appellant below and plaintiff in the district court.

Respondent is McCarthy & Holthus LLP, an appellee below and defendant in the district court.

Wells Fargo Bank, N.A., and Wells Fargo & Company were appellees below and defendants in the district court, but are not parties to the claims at issue in this petition.

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In the Supreme Court of the United States

No.

DENNIS OBDUSKEY, PETITIONER

v.

MCCARTHY & HOLTHUS LLP

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Dennis Obduskey respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-13a) is reported at 879 F.3d 1216. The opinion of the district court (App., *infra*, 14a-32a) is unreported but available at 2016 WL 4091174.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. 1692-1692p, are reproduced in the appendix to this petition (App., *infra*, 33a-37a).

INTRODUCTION

This case presents an important and recurring question of statutory construction that has squarely divided the lower courts. According to the Tenth Circuit, the FDCPA does not apply to non-judicial foreclosure proceedings. In so holding, the court sided with a split panel of the Ninth Circuit, and openly rejected the contrary decisions of multiple courts of appeals and two state supreme courts.

While the merits of this issue are hotly contested, there is no dispute about the existence of a clear and intractable conflict. All sides agree that this binary question of federal law has divided the circuits, and these courts have split after exhaustively considering each side of the debate. The confusion is extraordinary and entrenched: the question has generated over a hundred conflicting decisions and an acknowledged split among multiple appellate courts. There is no hope of the dispute dissipating on its own.

And the importance of the issue is difficult to overstate. Mortgage debt comprises roughly two-thirds of household debt in the United States, totaling over $8 trillion, and tens of thousands of foreclosures are initiated every month.[1] In 2016 alone, nearly 400,000 homes were lost to foreclosure, including about 200,000 in non-judicial

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[1] Federal Reserve Bank of New York, *Quarterly Report on Household Debt & Credit* (May 2017).

foreclosure States, and approximately 330,000 homes were in some stage of foreclosure at year's end.[2]

This threshold legal question determines whether homeowners may invoke the FDCPA's protections in this critical context. See Consumer Financial Protection Bureau, *Fair Debt Collection Practices Annual Report 2013* 27 (Mar. 20, 2013) (recognizing the issue's importance and the "divi[sion] among the courts"). Yet after dozens of decisions debating the question, the courts remain hopelessly deadlocked. This confusion will persist without this Court's intervention.

The Court denied review on this question earlier this Term, but in a case presenting a host of vehicle concerns. See Part C, *infra*. This case does not implicate a single one of those objections, and it is tailor-made for ending the overwhelming flood of cases on this issue. The present conflict is intolerable and it urgently needs an answer. Because this case presents an optimal vehicle for resolving this significant issue of federal law, the petition should be granted.

STATEMENT

1. a. Congress enacted the FDCPA in response to "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices." 15 U.S.C. 1692(a). It recognized this abuse as "a widespread and serious national problem," and it declared that a "primary" cause of the trouble was "the lack of meaningful legislation on the State level." S. Rep. No. 382, 95th Cong., 1st Sess. 2 (1977). Because "[e]xisting laws and procedures" proved "inadequate to protect consumers" (15 U.S.C. 1692(b)),

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[2] See http://www.corelogic.com/research/foreclosure-report/national-foreclosure-report-december-2016.pdf.

Congress sought to impose baseline, comprehensive protections against debt-collector misconduct. 15 U.S.C. 1692(e).

Those protections took the form of "open-ended prohibitions," together with non-exhaustive lists of specific forbidden practices. *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 587 (2010); cf. S. Rep. No. 95-382, at 4. The Act targeted everything from aggression and violence (*e.g.*, 15 U.S.C. 1692d(1), (2)), to the use of "false or misleading representations," including misstating the "character, amount, or legal status of the debt," employing "deceptive means to collect" a debt, or demanding amounts not "expressly authorized by the agreement creating the debt or permitted by law" (15 U.S.C. 1692e(2), (10), 1692f(1)). See, *e.g.*, *Heintz* v. *Jenkins*, 514 U.S. 291, 292 (1995) (explaining the general prohibitions). The FDCPA also mandated a process for debt collectors to provide consumers notice of their alleged debts; this process granted consumers a specific right to dispute those debts, and required debt collectors to "cease collection of the debt" pending validation. 15 U.S.C. 1692g.

b. The FDPCA regulates solely the conduct of professional "debt collectors." The Act broadly defines "debt collector" as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. 1692a(6).[3] Any person meeting

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[3] The Act also broadly defines "debt": the term "means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal,

that definition is subject to the full panoply of the FDCPA's restrictions.

The Act further expands its coverage with an additional definition: "For purposes of section 1692f(6) of this title," the "term ['debt collector'] also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is *the enforcement of security interests*." 15 U.S.C. 1692a(6) (emphasis added). Section 1692f(6), in turn, regulates conduct typical of repossession agents (*i.e.*, the classic "repo men"):

> Taking or threatening to take any non-judicial action to effect dispossession or disablement of property if—
>
> (A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;
>
> (B) there is no present intention to take possession of the property; or
>
> (C) the property is exempt by law from such dispossession or disablement.

15 U.S.C. 1692f(6). The Act does not textually exclude those qualifying under *both* definitions (the general and the additional) from the Act's general prohibitions.

This two-part definition of "debt collector" is followed by a list exempting six groups from the Act's coverage. See 15 U.S.C. 1692a(6)(A)-(F). That list does not include those pursuing foreclosures or enforcing other security interests.

2. In 2007, petitioner obtained a $329,940 home loan from Magnus Financial Corporation. App., *infra*, 2a. At

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family, or household purposes, whether or not such obligation has been reduced to judgment." 15 U.S.C. 1692a(5).

some point, the loan was transferred to other entities, and Wells Fargo Bank, N.A., began servicing the loan. *Id.* at 15a. Wells Fargo has since "'claimed numerous different owners of the note.'" *Id.* at 15a, 19a.

Between 2008 and 2012, Wells Fargo offered petitioner a variety of loan modifications. App., *infra*, 15a. During that period, petitioner made 12 "trial payments" under three different modification offers. But rather than process the new loan modification, Wells Fargo "accepted the payments and applied them as 'late payments on the account and for other unspecified fees.'" *Ibid.* Petitioner received mixed communications from Wells Fargo throughout this time, including "'opposing messages [received] within days of each other.'" *Ibid.* Petitioner submitted complaints about Wells Fargo's conduct to the Federal Trade Commission. *Id.* at 15a-16a.

In 2009, petitioner defaulted on his loan, and Wells Fargo began non-judicial foreclosure proceedings. App., *infra*, 2a, 15a. Over the next six years, Wells Fargo initiated multiple foreclosure attempts, but none were completed. *Id.* at 2a, 15a. It eventually retained respondent, a law firm, to pursue a foreclosure of petitioner's property. *Id.* at 2a, 16a. Respondent sent petitioner an "undated" later in August 2014. *Id.* at 16a. It declared that respondent "may be considered a debt collector attempting to collect a debt," and "any information obtained will be used for that purpose." C.A. Supp. App. 127 (capitalization altered); App., *infra*, 2a, 20a-21a. It advised petitioner of its intent to seek a non-judicial foreclosure, announced "the total amount of the debt currently owed," explained that "interest, late charges, and other charges" may increase "the amount due on the day you pay," instructed that "[t]he current creditor to whom the debt/loan is owed is[] Wells Fargo Bank, N.A.," and declared that it would "assume this debt to be valid unless [petitioner] dispute[s] its

validity, or any part of it, within 30 days after receiving this notice." C.A. Supp. App. 127; App., *infra*, 2a.

Petitioner responded to the letter with multiple objections. App., *infra*, 2a, 16a; C.A. Supp. App. 124-125. He contested the alleged amount of the debt, and invoked the FDCPA's debt-validation procedures, which required respondent to cease all collection activity until confirming the validity of the debt and providing the necessary documentation to petitioner. App., *infra*, 2a, 16a; see also 15 U.S.C. 1692g(a)-(b). Instead of validating the debt, respondent initiated a new foreclosure action in May 2015. App., *infra*, 2a. In response, petitioner filed a complaint with the Consumer Financial Protection Bureau objecting to respondent's conduct. *Id.* at 16a.

3. In August 2015, petitioner filed this suit against respondent and Wells Fargo, asserting claims under the FDCPA and Colorado state law. App., *infra*, 2a-3a, 16a. As relevant here, petitioner alleged that respondent was a debt collector, and its conduct violated multiple provisions of the FDCPA, including the debt-validation requirements of Section 1692g. *Id.* at 4a & n.2, 18a.

Respondent moved to dismiss, and the district court granted the motion. App., *infra*, 14a-32a. As the sole basis for dismissal, the district court found that "the FDCPA does not apply to non-judicial foreclosures." *Id.* at 20a-21a. The court noted that "[n]ot all courts have agreed" on the issue, but it declared that "the majority" have decided "foreclosure activities are outside the scope of the FDCPA." *Id.* at 20a. It accordingly rejected "cases outside of this district" reaching the opposite conclusion (*ibid.*), and dismissed the case against respondent. *Id.* at 21a, 32a.

4. A unanimous panel of the Tenth Circuit affirmed. App., *infra*, 1a-13a.

Like the district court, the court of appeals recognized the stark disagreement over the question presented. App., *infra*, 3a, 5a. In order to "settle this confusion," it requested "supplemental briefing on the issue," and ultimately "h[eld] that the FDCPA does not apply to non-judicial foreclosure proceedings." *Id.* at 3a, 5a-12a.

Before squarely addressing the dispositive issue, the court first cleared the path for a clean disposition. App., *infra*, 5a. It initially rejected respondent's argument that petitioner had "failed to adequately allege a claim against it under the FDCPA." *Ibid.* At a minimum, the court found, petitioner "has sufficiently pled that [respondent] failed to verify [petitioner's] debt after it was disputed, in violation of § 1692g." *Ibid.* It likewise rejected respondent's argument—"claimed for the first time in oral argument"—that petitioner had somehow "waived the FDCPA claim against it." *Ibid.* On the contrary, the court explained, petitioner "specifically argue[d] in his opening brief that [respondent] 'violated the FDCPA by ignoring [a] valid written request related to verification of the debt and continued to collect.'" *Ibid.*[4]

Turning to the key issue, the court noted that "[w]hether the FDCPA applies to non-judicial foreclosure proceedings has divided the circuits." App., *infra*, 5a. It

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[4] The panel also affirmed the lower court's dismissal of petitioner's claims against Wells Fargo. As each court found, "[t]he FDCPA excludes 'any person collecting or attempting to collect any debt * * * which was not in default at the time it was obtained by such person.'" App., *infra*, 4a (quoting 15 U.S.C. 1692a(6)(F)); *id.* at 18a. According to the panel, while it was unclear when (or if) Wells Fargo acquired the loan itself, petitioner "admit[ted] that Wells Fargo began servicing the loan before he went into default." *Id.* at 4a-5a; see also *id.* at 19a. That pre-default activity excluded Wells Fargo as a "debt collector" under the FDCPA. *Id.* at 5a, 19a-20a. Petitioner is not challenging that determination here.

stated that the "Ninth Circuit, along with numerous district courts, has held that non-judicial foreclosure proceedings are not covered under the FDCPA" (*id.* at 5a), while "[t]he Fourth, Fifth, and Sixth Circuits, as well as the Colorado Supreme Court," have taken the opposite position. *Id.* at 5a-6a (citing *Wilson* v. *Draper & Goldberg, P.L.L.C.*, 443 F.3d 373 (4th Cir. 2006), *Kaltenbach* v. *Richards*, 464 F.3d 524 (5th Cir. 2006), *Glazer* v. *Chase Home Fin. LLC*, 704 F.3d 453 (6th Cir. 2013), and *Shapiro & Meinhold* v. *Zartman*, 823 P.2d 120 (Colo. 1992)). The panel also flagged conflicting decisions and "confusion" in the District of Colorado, emphasizing the need "to provide clarity in this circuit." *Id.* at 3a, 6a & n.3.

The panel started its analysis with the "plain language of the FDCPA." App., *infra*, 5a-6a. Agreeing with the Ninth Circuit, the panel reasoned that "debt is synonymous with 'money,'" and the FDCPA applies "'only when an entity is attempting to collect' money." *Id.* at 7a (quoting *Ho* v. *ReconTrust Co., NA*, 858 F.3d 568, 571-572 (9th Cir. 2017)). Because non-judicial foreclosures do not obligate consumers "'to pay money,'" the panel reasoned, such foreclosures are "not covered under the FDCPA." *Ibid.*

In reaching this conclusion, the panel expressly rejected "the Sixth Circuit's decision in *Glazer*." App., *infra*, 8a (quoting *Glazer*'s "contrary" holding that "'*every* mortgage foreclosure' * * * is undertaken for the very purpose of obtaining payment on the underlying debt, either by persuasion * * * or compulsion'"). According to the panel, this "contrary position" fails because non-judicial foreclosure does not permit collection "'personally against the mortgagor.'" *Ibid.* While a creditor could "collect a deficiency" in a "separate action" after the "non-judicial foreclosure sale" (*id.* at 8a-9a (citing Colorado law)), the foreclosure itself "only allows 'the trustee to obtain proceeds

from the sale of the foreclosed property, and no more'" (*id.* at 9a). The panel thus found that it did not qualify as a "direct[] or indirect[]" attempt (15 U.S.C. 1692a(6)) to collect a debt. *Id.* at 6a-9a.

Next, the panel rejected other courts' reliance on "§ 1692i—'Legal actions by debt collectors'—as evidence that Congress intended the FDCPA to apply to mortgage foreclosures." App., *infra*, 9a. That section regulates permissible venue for "action[s] to enforce an interest in real property securing the consumer's obligation." 15 U.S.C. 1692i(a)(1). Although other courts read this language as necessarily confirming that "debt collection" includes foreclosure actions (the subject of Section 1692i), the panel "disagree[d]." *Id.* at 10a. It reasserted its view that seeking non-judicial foreclosure falls outside Section 1692a(6), and it further noted that Section 1692i only covers "judicial proceeding[s]," whereas "*non-judicial*" foreclosures "plainly do[] not fall under this definition." *Ibid.*

Finally, the panel asserted that "policy considerations" support its holding. App., *infra*, 10a. It reasoned that applying the FDCPA in this context "would conflict with Colorado mortgage foreclosure law." *Id.* at 10a-11a (citing two examples where Colo. R. Civ. P. 120 requires "notice" arguably conflicting with the FDCPA). The panel stated that "mortgage foreclosure is 'an essential state interest,'" and found "no 'clear and manifest' intention on the part of Congress to supplant state non-judicial foreclosure law." *Id.* at 11a.[5] In doing so, the panel rejected

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[5] The panel earlier acknowledged commentary from the "Colorado Rule 120 Committee" recommending, in response to "'considerable debate'" over the FDCPA's applicability, that persons conducting non-judicial foreclosures "'comply'" with the FDCPA, "'notwithstanding any provision of this Rule.'" App., *infra*, 6a n.3.

other courts' "contrary conclusion" that Congress would not have intended to "immunize debt secured by real property where foreclosure was used to collect the debt." *Id.* at 12a (citing conflicting decisions from the Third and Fourth Circuits).[6]

The court accordingly "h[eld] that [respondent's] mere act of enforcing a security interest through a non-judicial foreclosure proceeding does not fall under the FDCPA." App., *infra*, 12a.[7]

REASONS FOR GRANTING THE PETITION

A. There Is A Clear And Intractable Conflict Regarding Whether The FDCPA Covers Non-Judicial Foreclosure Proceedings

The Tenth Circuit's decision deepens a preexisting "divi[sion]" over whether the FDCPA applies to non-judicial foreclosures. App., *infra*, 5a. That circuit conflict is both clear and undeniable, and it should be resolved by this Court.

1. a. The decision below directly conflicts with settled law in the Fourth Circuit. In *Wilson* v. *Draper & Goldberg, P.L.L.C.*, 443 F.3d 373 (4th Cir. 2006), as here, a creditor hired a law firm to "foreclose" after the plaintiff defaulted on a home loan. 443 F.3d at 374. After receiving the firm's initial notice, the plaintiff wrote "to dispute the

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[6] The panel "left for another day" the distinct question whether "more aggressive collection efforts leveraging the threat of foreclosure into the payment of money" would "constitute 'debt collection.'" App., *infra*, 12a. While both the Ninth and Tenth Circuits have raised that possibility, the core split among the circuits is whether non-judicial foreclosure *without* additional conduct qualifies as debt collection. *Id.* at 5a (acknowledging the conflict over this question). This is why the panel recognized its holding was necessary to resolve the rampant "confusion" in the lower courts. *Id.* at 3a, 6a & n.3.

[7] The court of appeals also disposed of petitioner's state-law claims, which are not at issue here. App., *infra*, 13a.

debt and to request that [the firm] verify it" with the creditor. *Id.* at 374-375. The firm instead "commenced foreclosure proceedings." *Id.* at 375. The plaintiff sued under the FDCPA, "alleging that [the firm] violated the Act by failing to verify the debt, [and] by continuing collection efforts after she had contested the debt." *Ibid.*

On appeal, the Fourth Circuit held that attorneys "acting in connection with a foreclosure can be 'debt collectors' under the Act." 473 F.3d at 375. It rejected the firm's argument that "'foreclosing on a deed of trust is an entirely different path [than collecting funds from a debtor],'" and instead found that "'foreclosure is a method of collecting a debt by acquiring and selling secured property to satisfy a debt.'" *Id.* at 376 (further rejecting the notion that "'[p]ayment of funds is not the object of the foreclosure action'" and the lender is merely "'foreclosing its interest in the property'"); contra App., *infra*, 7a-9a. The court held that "foreclosure proceedings were used to collect the debt," and it refused to "create an enormous loophole in the Act" for "foreclosure proceedings." 443 F.3d at 376.

The Fourth Circuit also dismissed the firm's reliance on Section 1692a(6)'s additional definition for "'the enforcement of security interests.'" 443 F.3d at 378. The court explained that this provision applies to entities like repossessors, "whose *only* role in the debt collection process is the enforcement of a security interest." *Ibid.* The "provision is not an exception to the definition of debt collector, it is an inclusion to the term debt collector." *Ibid.* It therefore "does not exclude those who enforce security interests but who also fall under the general definition." *Ibid.* (citing *Piper* v. *Portnoff Law Assocs., Ltd.*, 396 F.3d 227, 236 (3d Cir. 2005)).

The court accordingly "h[eld] that [the firm's] foreclosure action was an attempt to collect a 'debt,'" and the firm

"can still be 'debt collectors' even if they were also enforcing a security interest." 443 F.3d at 378-379.

The Fourth Circuit reaffirmed *Wilson* in *McCray* v. *Fed. Home Loan Mortg. Corp.*, 839 F.3d 354 (4th Cir. 2016). As here, "Wells Fargo retained" a law firm "to pursue foreclosure" after the plaintiff defaulted on a home loan. 839 F.3d at 357. The court held that foreclosure activities constitute 'debt collection': "in *Wilson*, we explicitly rejected the argument 'that foreclosure * * * is not the enforcement of an obligation to pay money or a "debt," but is [merely] a termination of the debtor's equity of redemption relating to the debtor's property.'" *Id.* at 360. On the contrary, the court found, "the whole reason that the [law firm was] retained by Wells Fargo was to attempt, *through the process of foreclosure*, to collect on the $66,500 loan in default." *Ibid.* (emphasis added). As the court concluded, the firm's "debt collection" was anticipated *via foreclosure*, and the firm acted as "debt collectors" for foreclosure activities despite never "'express[ly] demand[ing]'" payment. *Id.* at 359. That holding is irreconcilable with the Tenth Circuit's decision below. App., *infra*, 7a, 12a.

b. Also in direct conflict with the decision below, the Sixth Circuit likewise "hold[s] that mortgage foreclosure is debt collection under the Act." *Glazer* v. *Chase Home Fin. LLC*, 704 F.3d 453, 455 (6th Cir. 2013); see also, *e.g.*, *Mellentine* v. *AmeriQuest Mortg. Co.*, 515 F. App'x 419, 421, 423 (6th Cir. 2013) (following *Glazer* in holding a law firm was a "debt collector" under the FDCPA for "sen[ding] a letter to the [plaintiffs] notifying them of their default and informing them that Chase was beginning foreclosure proceedings").

In *Glazer*, Chase Bank hired a law firm to foreclose on a defaulted home loan. 704 F.3d at 456. The plaintiff alleged the firm violated the FDCPA by, among other

things, including false statements in its foreclosure complaint and "refus[ing] to verify the debt upon request." *Id.* at 457.

The Sixth Circuit began by "declin[ing] to follow" the very position adopted below: that "mortgage foreclosure is not debt collection" unless "a money judgment is sought against the debtor in connection with the foreclosure." 704 F.3d at 460; contra App., *infra*, 7a-9a, 12a. On the contrary, the court held that "*any* type of mortgage foreclosure action, *even one not seeking a money judgment on the unpaid debt*, is debt collection under the Act." *Id.* at 462 (second emphasis added). As the court explained, "*every* mortgage foreclosure, judicial or otherwise, is undertaken for the very purpose of obtaining payment on the underlying debt, either by persuasion (*i.e.*, forcing a settlement) or compulsion (*i.e.*, obtaining a judgment of foreclosure, selling the home at auction, and applying the proceeds from the sale to pay down the outstanding debt)." *Id.* at 461. In short, "[t]here can be no serious doubt that the ultimate purpose of foreclosure is the payment of money." *Id.* at 463.[8]

The Sixth Circuit supported its view with the FDCPA's "plain language" and a close analysis of its overall provisions, including Section 1692i's venue provision (showing that "filing *any* type of mortgage foreclosure action * * * is debt collection under the Act"). 704 F.3d at 460-462. It further disagreed that its interpretation would render Section 1692a(6)'s additional definition surplusage. *Id.* at 463-464. As the court explained, this additional definition concerns "the business of repossessors." *Id.* at 464. The sentence "operates to *include* certain persons

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[8] Although not pertinent to the court's categorical analysis, the firm in *Glazer* emphasized that it did not seek a deficiency judgment. C.A. Answering Br. 28 n.5, 39, No. 10-3416 (6th Cir. Nov. 1, 2010).

under the Act (though for a limited purpose); it does not *exclude* from the Act's coverage a method commonly used to collect a debt." *Id.* at 463. "Indeed," as the court concluded, "all of the cases we found where §§ 1692f(6) and 1692a(6)'s third sentence were held applicable involved *repossessors*." *Id.* at 464.

While the court recognized the "confusion" over the question and that "courts have taken varying approaches on the issue," it found the approach adopted below "unpersuasive" and instead declared that "mortgage foreclosure is debt collection under the Act." 704 F.3d at 460, 464.

c. The Tenth Circuit's decision is also directly at odds with law in the Third Circuit. As the Ninth Circuit recognized, the Third Circuit holds that "foreclosure-related activities constitute debt collection," even without a deficiency judgment. *Ho*, 858 F.3d at 576 & n.11 (citing *Piper*, 396 F.3d at 235-236).

In *Kaymark* v. *Bank of Am., N.A.*, 783 F.3d 168 (3d Cir. 2015), the court of appeals held that "foreclosure meets the broad definition of 'debt collection' under the FDCPA." 783 F.3d at 179 (relying on *Wilson*, *Glazer*, and *Piper*). That case, as here, involved a law firm retained to pursue a foreclosure after the plaintiff defaulted on a home loan. *Id.* at 171-172. The plaintiff alleged that the firm misstated the amounts due in the foreclosure complaint, and sued under the FDCPA. *Id.* at 173.[9]

The court of appeals held that foreclosure activities are subject to the FDCPA. *Id.* at 179. The court first set aside the firm's argument that "foreclosure actions cannot be the basis of FDCPA claims." *Id.* at 176, 178. As the

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[9] "Mortgage foreclosure in Pennsylvania is strictly an *in rem* or '*de terris*' proceeding. Its purpose is solely to effect a judicial sale of the mortgaged property." *Nicholas* v. *Hofmann*, 158 A.3d 675, 696 (Pa. Super. Ct. 2017).

court explained, "the statutory text, as well as the case law interpreting the text, renders this argument meritless." *Ibid.* It found that the firm "acted as a 'debt collector' when, by filing the Foreclosure Complaint, it 'attempt[ed] to collect' a debt on behalf of BOA." *Id.* at 176-177. Moreover, the court reasoned, "[n]owhere does the FDCPA exclude foreclosure actions from its reach." *Id.* at 179. "On the contrary," the court explained, "foreclosure meets the broad definition of 'debt collection' under the FDCPA": it qualifies as "'activity undertaken for the general purpose of inducing payment,'" and "it is even contemplated in various places in the statute." *Ibid.* (citing 15 U.S.C. 1692i).

As the court explained, the firm "would have us 'create an enormous loophole in the [FDCPA] [by] immunizing any debt from coverage if that debt happened to be secured by a real property interest and foreclosure proceedings were used to collect the debt.'" *Ibid.* (quoting *Wilson*, 443 F.3d at 376). The court refused the invitation: "'if a collector were able to avoid liability under the FDCPA simply by choosing to proceed *in rem* rather than *in personam*, it would undermine the purpose of the FDCPA." *Ibid.* (quoting *Piper*, 396 F.3d at 236). *Kaymark* is now irreconcilable with contrary precedent in the Ninth and Tenth Circuits.[10]

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[10] *Piper* is likewise out of step with the decision below. There, the creditor, as here, retained a law firm, which sought an *in rem* foreclosure to enforce a lien arising from unpaid water and sewer obligations. 396 F.3d at 229. In addition to finding that the firm demanded payment while enforcing the lien (*id.* at 233-234), the court rejected the firm's reliance on Section 1692a(6)'s additional definition of security enforcers: "The portion of § 1692a(6) upon which [the firm] relies is not among the six listed *exceptions* to the general definition. It is cast in terms of *inclusion*, and we believe it was intended to make clear that some persons who would be without the scope of the general definition are to be included where § 1692f(6) is concerned." *Id.* at 236 (citing, for example, "an automobile repossession business").

d. The Tenth Circuit's decision also directly conflicts with the decisions of two state high courts, including an intra-regional conflict with the Colorado Supreme Court.

First, in *Shapiro & Meinhold* v. *Zartman*, 823 P.2d 120 (Colo. 1992), the court reached the opposite conclusion on materially identical facts: whether the FDCPA covered attorneys hired to pursue a foreclosure on a defaulted home loan. *Id.* at 121. The Court held that the FDCPA applied:

> The section 1692a(6) definition of the term debt collector includes one who 'directly or indirectly' engages in debt collection activities on behalf of others. Since a foreclosure is a method of collecting a debt by acquiring and selling secured property to satisfy a debt, those who engage in such foreclosures are included within the definition of debt collectors if they otherwise fit the statutory definition.

Id. at 124.

The court further rejected the firm's argument that those enforcing security interests, including "foreclosures," are subject only to Section 1692f(6), not the Act's general requirements. 823 P.2d at 123 (relying on Section 1692a(6)'s additional definition). As the court explained, that additional definition "does not limit the definition of debt collectors, but rather enlarges the category of debt collectors for the purpose of section 1692f(6)." *Id.* at 124. "If Congress had intended to exempt from the FDCPA one whose principal business is the enforcement of security interests, it would have provided an exception in plain language." *Ibid.*

The decision below is thus particularly intolerable in Colorado, where the same federal law now means different things in state and federal court. That encourages the kind of unpalatable forum-shopping that this Court has studiously worked to avoid.

Second, the Alaska Supreme Court, again on indistinguishable facts, held that "an entity pursuing non-judicial foreclosure is a debt collector subject to the FDCPA." *Alaska Trustee, LLC* v. *Ambridge*, 372 P.3d 207, 213 (Alaska 2016); see also *id.* at 212-213 & nn.14-15 (acknowledging the "split" of authority, and "join[ing] those courts holding that mortgage foreclosure, whether judicial or nonjudicial, is debt collection"); contrast *id.* at 227-234 (Winfree, J., dissenting) (rejecting, *e.g.*, *Glazer*, in reaching the same conclusion as the Ninth and Tenth Circuits).

The court started with "the Act's broad language," and declared *Wilson* and *Glazer* persuasive: "foreclosing on property, selling it, and applying the proceeds to the underlying indebtedness constitute one way of collecting a debt—if not directly at least indirectly." 372 P.3d at 213-216. As the court reasoned, "the real nature of a home mortgage foreclosure" is debt collection, and "a reasonable consumer *would* read the notice as a demand for payment." *Id.* at 217-218.

Addressing Section 1692a(6)'s additional definition, the court agreed with the Third, Fourth, and Sixth Circuits: "Th[e] general definition [of 'debt collector'] is explicitly *expanded*, not qualified," by the inclusive language targeting security interests. 372 P.3d at 219; see also *id.* at 219-220 (explaining how the additional definition is not redundant, as it covers "repossession agenc[ies]" that "may take automobiles off the street" without any communication).

Finally, the court rejected the proposition that the firm could escape liability because foreclosure notices were "statutorily required" by state law: "[T]hat a notice is required in order to advance a state foreclosure proceeding does not mean it cannot at the same time be an attempt to collect a debt and thus subject to the FDCPA." *Id.* at 217-218 (discussing *Romea* v. *Heiberger & Assocs.*,

163 F.3d 111, 116 (2d Cir. 1998)). And it likewise refuted the contention that the FDCPA would "wreak havoc" on Alaska's non-judicial foreclosure process, given the ease of complying with the FDCPA's provisions. *Id.* at 218.

f. Numerous district courts outside these jurisdictions have reached similar conclusions. See, *e.g.*, *Rinaldi* v. *Green Tree Servicing LLC*, No. 14-CV-8351(VB), 2015 WL 5474115, at *3 (S.D.N.Y. June 8, 2015); *Saccameno* v. *Ocwen Loan Servicing, LLC*, No. 15-C-1164, 2015 WL 7293530, at *5 (N.D. Ill. Nov. 19, 2015); *Castrillo* v. *Am. Home Mortgage Servicing, Inc.*, 670 F. Supp. 2d 516, 525 (E.D. La. 2009); *Bieber* v. *J. Peterman Legal Group Ltd.*, 104 F. Supp. 3d 972, 974-976 (E.D. Wisc. 2015); *Lara* v. *Specialized Loan Servicing, LLC*, No. 1:12-cv-24405-UU, 2013 WL 4768004, at *4 (S.D. Fla. Sept. 6, 2013); *Muldrow* v. *EMC Mortgage Corp.*, 657 F. Supp. 2d 171, 175-176 (D.D.C. 2009).

2. a. A divided panel of the Ninth Circuit reached the opposite conclusion in *Ho* v. *ReconTrust Co., NA*, 858 F.3d 568 (9th Cir.), cert. denied, 138 S. Ct. 504 (2017). The majority recognized that the "circuits [have] divide[d]" over the question presented (*id.* at 576), but it held that the FDCPA does not apply to non-judicial foreclosures. See 858 F.3d at 576 & n.11 (citing conflicting decisions from the Third, Fourth, Fifth, Sixth, Tenth, and Eleventh Circuits).[11]

First, the majority argued that a non-judicial foreclosure does not attempt to collect a "debt." 858 F.3d at 571-573. According to the majority, non-judicial foreclosures

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[11] As an independent ground, the court separately held that the original trustee was not a "debt collector" under the exception for activities "'incidental to * * * a bona fide escrow arrangement.'" 858 F.3d at 574-575 (quoting 15 U.S.C. 1692a(6)(F)) (alteration in original). That exception (which applies, if at all, to original trustees) is irrelevant here.

aim only "to retake and resell the security, not to collect money from the borrower." *Id.* at 571. As the majority explained, foreclosure might "induce[]" the borrower "to pay off a debt," but "that inducement exists by virtue of the lien, regardless of whether foreclosure proceedings actually commence." *Id.* at 572. In taking this position, the majority expressly "affirm[ed] the leading case of *Hulse* v. *Ocwen Federal Bank*, 195 F. Supp. 2d 1188, 1204 (D. Or. 2002), which held that 'foreclosing on a trust deed is an entirely different path' than 'collecting funds from a debtor.'" *Ibid.*

The court openly admitted that the Fourth and Sixth Circuits "have declined to follow *Hulse*." 858 F.3d at 572 (citing *Glazer*, 704 F.3d at 461; *Wilson*, 443 F.3d at 378-379). But the majority found "neither case persuasive." *Ibid.* It asserted that the Fourth Circuit eschewed the FDCPA's text to close "what it viewed as a 'loophole in the Act.'" *Ibid.* (quoting *Wilson*, 443 F.3d at 376). And it disagreed with the Sixth Circuit's "premise that 'the ultimate purpose of foreclosure is the payment of money,'" because a foreclosure sale "collects money from the home's purchaser, not from the original borrower." *Ibid.* (quoting *Glazer*, 704 F.3d at 463).

The majority next bolstered its conclusion with Section 1692a(6)'s "narrower definition of 'debt collector'"—an entity "whose principal business purpose is 'the enforcement of security interests.'" 858 F.3d at 572-573. The panel reasoned that "[t]his provision would be superfluous if all entities that enforce security interests were already included in the definition of debt collector for purposes of the entire FDCPA." *Id.* at 573. As such, the majority explained, "[t]he most plausible reading of the statute is that the foreclosure notices" fit only that narrower definition. *Id.* at 572.

Here the majority again "diverge[d]" from *Wilson* and *Glazer*. 858 F.3d at 573. It stated that the Sixth Circuit "rejected this view" on the logic that the security-enforcement definition governs repossessors who need not communicate with the debtor. *Id.* at 573-574. The majority found "this distinction unpersuasive" because even "repossessors will communicate with debtors." *Id.* at 574. And the majority again declared it irrelevant that the notices may have "pressured [the debtor] to send money to Countrywide": if that pressure "transform[ed] the enforcement of security interests into debt collection," it "would render meaningless the FDCPA's carefully drawn distinction between debt collectors and enforcers of security interests." *Ibid.*[12]

Finally, the majority maintained that its view would avoid frustrating the "California statutes governing non-judicial foreclosure." 858 F.3d at 575. It offered a handful of state-law duties that might conflict with the FDCPA's requirements, and thus declined "to construe federal law in a manner that interferes with California's system for conducting non-judicial foreclosures." *Id.* at 575-577.[13]

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[12] The act of "selling the home at auction[] and applying the proceeds from the sale to pay down the outstanding debt" (*Glazer*, 704 F.3d at 461) occurs in *every* foreclosure. The Ninth Circuit (and now the Tenth Circuit) characterize that activity as enforcing a security interest; other circuits declare it "debt collection."

[13] The majority also asserted that its decision was tied to "the nuances of California foreclosure law" (858 F.3d at 572), but it never identified what those "nuances" were. None are apparent. Indeed, its "holding" "affirms" the "leading" decision of an *Oregon* district court applying *Oregon law*. *Ibid.* Its analysis turned on the general logic that foreclosure seeks to enforce a security interest, not to collect a debt, and payment comes "from the home's purchaser, not from the original borrower." *Id.* at 571-575. The court ultimately *rejected* (not *distinguished*) other circuits' views because the conflict is a *conflict*,

Judge Korman dissented. 858 F.3d at 577-590. In an extensive opinion, he addressed each of the majority's points, and concluded that "the only reasonable reading [of the FDCPA] is that a trustee pursuing a nonjudicial foreclosure proceeding is a debt collector." *Id.* at 578 (citing decisions from the Third, Fourth, and Sixth Circuits, and the Alaska Supreme Court and Colorado Supreme Court).

As Judge Korman explained, foreclosure, at its irreducible core, is "intended to obtain money by forcing the sale of the property being foreclosed upon." 858 F.3d at 578. It either "*directly*" obtains money by "prompt[ing]" or "scar[ing]" the borrower into paying to prevent foreclosure, or "*indirectly*" obtains money by eliminating "the debtor's interest and equity in the property." *Id.* at 581. Indeed, as Judge Korman noted, the majority did not "even address the language of section 1692a(6) that defines 'debt collector' as one who attempts to collect 'indirectly' debts owed to another." *Id.* at 582.

Judge Korman next refuted the majority's reliance on Section 1692a(6)'s additional definition for repossessors. 858 F.3d at 582-583. He explained that nothing in Section 1692a(6)'s language suggests that including the extra definition—which *expanded* the provision's reach—somehow

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not the product of disparate state-law schemes. *Id.* at 574 (declaring Fourth and Sixth Circuit precedent "[un]persuasive"). And the Ninth Circuit has since repeatedly applied *Ho* to cases arising outside California, and treated the holding as categorical. See, *e.g.*, *Hamilton* v. *Tiffany & Bosco PA*, No. 15-15473, 2018 WL 1042528, at *1 (9th Cir. Feb. 26, 2018) (applying *Ho* to Arizona case); *Greer* v. *Green Tree Serving LLC*, 708 F. App'x 371, 371 (9th Cir. 2017) (applying *Ho* to Washington case); *Dowers* v. *Nationstar Mortg., LLC*, 852 F.3d 964, 969-970 (9th Cir. 2017) (applying *Ho* to Nevada case). The court of appeals here was able to adopt *Ho* without citing "nuances" of Colorado law for an obvious reason: the circuit conflict turns on *federal* law, not the law of any particular State.

excludes those who also satisfy the general definition, especially when Section 1692a directly exempts other groups. *Id.* at 583 (citing 15 U.S.C. 1692a(6)(A)-(F)). As Judge Korman explained, this additional definition was designed to cover entities who enforce security interests without engaging in traditional collection activity—as is often the case when repo men "effect dispossession or disablement" of *personal* property. *Id.* at 583-584.

Judge Korman also argued (858 F.3d at 584) that the FDCPA's venue clause confirms that foreclosures satisfy the general "debt collection" definition: "Any debt collector" suing "to enforce an interest in real property securing the consumer's obligation" must sue "only in a judicial district" where "such real property is located." 15 U.S.C. 1692i(a)(1). Congress thus "understood that a mortgage foreclosure proceeding * * * constitutes debt collection." 858 F.3d at 584.

Finally, Judge Korman rejected the majority's concerns about interfering with California's non-judicial foreclosure scheme. 858 F.3d at 585-586, 587-590. He highlighted the lack of any trouble in the multiple jurisdictions where the FDCPA covers foreclosure activities, and he showed how the specific conflicts the majority identified were illusory: each could be accommodated with easy practical steps or a sensible reading of state or federal law. *Ibid.* (noting "how readily the California foreclosure system can function alongside the FDCPA").

In any event, Judge Korman concluded, even if an actual conflict existed, the FDCPA expressly preempts inconsistent state laws (15 U.S.C. 1692n), and has a mechanism for exempting certain collection practices (15 U.S.C. 1692o). 858 F.3d at 588-590. This "promote[s] consistent State action to protect consumers against debt collection abuses" (15 U.S.C. 1692(e)), and prevents States from

"undermining the minimum national standards that Congress has adopted." *Id.* at 579. He declared the majority's concerns were insufficient to "adopt an unnatural reading of the term 'debt collector.'" *Id.* at 590.[14]

b. Like the Ninth and Tenth Circuits, numerous district courts have held that the FDCPA does not regulate foreclosure-related activities. This side of the split is thus also fully ventilated. *E.g.*, *Glazer*, 704 F.3d at 460 (noting the "pervasiveness" of *Hulse*'s view); *Hahn* v. *Anselmo Linberg Oliver LLC*, No. 16-cv-8908, at *3-*4 (N.D. Ill. Mar. 31, 2017); *Iroh* v. *Bank of Am., N.A.*, No. 4:15-CV-1601, 2015 WL 9243826, at *4 (S.D. Tex. Dec. 17, 2015); *Delisfort* v. *U.S. Bank Trust, N.A.*, 2017 WL 1337620, at *3 (S.D. Fla. Feb. 7, 2017); *Beadle* v. *Haughey*, No. Civ.-04-272-SM, 2005 WL 300060, at *3 (D.N.H. Feb. 9, 2005); *Sylvia* v. *Bank of N.Y. Mellon*, No. 1:12-CV-02598-WSD-JFK, 2012 WL 12844769, at *8 (N.D. Ga. Oct. 25, 2012); *Fleming* v. *U.S. Nat'l Bank Ass'n*, No. 14-3446(DSD/JSM), 2015 WL 505758, at *2 (D. Minn. Feb. 6, 2015); *Speleos* v. *BAC Home Loans Servicing LP*, 824 F. Supp. 2d 226, 232-233 (D. Mass. 2011); *Williams* v. *Ocwen Loan Servicing*, No. 1:15-CV-3914-ELR-JSA, 2016 WL 5339359, at *11 (N.D. Ga. May 9, 2016).

3. The decision below also creates substantial tension with decisions in the Eleventh and Fifth Circuits, which themselves have adopted inconsistent positions.

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[14] See also, *e.g.*, *Piper*, 396 F.3d at 236 n.11 ("Congress enacted the FDCPA despite the fact that some states already had procedural requirements for debt collectors * * * in place, because it 'decided to protect consumers who owe money by adopting a different, and in part more stringent, set of requirements that would constitute minimum national standards for debt collection practices.'") (quoting *Romea*, 163 F.3d at 115).

First, the prevailing rule in the Eleventh Circuit is opaque. While the Ninth Circuit suggested the Eleventh Circuit supported its interpretation (*Ho*, 858 F.3d at 577 n.11), the Eleventh Circuit adopted the *opposite* position on these facts: it held that *foreclosure-related notices* may trigger FDCPA liability, even if the *actual foreclosure itself* cannot. *Reese* v. *Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211, 1217-1218 (11th Cir. 2012).[15]

In *Reese*, the court confronted a non-judicial foreclosure in which the defendant notified the borrower that a foreclosure sale would be conducted unless the loan was satisfied in accordance with the lender's demand for full payment. 678 F.3d at 1214. The court rejected the argument that the notice only "inform[ed]" the borrower that the lender "intended to enforce its security deed through the process of non-judicial foreclosure"; instead, citing *Wilson* and *Piper*, the court held: "The fact that the letter and documents relate to the enforcement of a security interest does not prevent them from also relating to the collection of a debt within the meaning of § 1692e." *Id.* at 1217-1218. The court merely disclaimed that it was deciding "whether enforcing a security interest is itself debt-collection activity." *Id.* at 1218 n.3. Under the holding in *Reese*, petitioner's claim would arguably have come out the other way.

Although subsequent unpublished decisions are less clear, the current rule in the Eleventh Circuit reflects a middle ground—the foreclosure itself does not constitute debt collection, but communications pertaining to the foreclosure can trigger FDCPA liability. Compare, *e.g.*,

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[15] The Ninth Circuit cited an earlier, unpublished Eleventh Circuit decision holding that "foreclosing on a home is not debt collection" but only the enforcement of a security interest. *Warren* v. *Countrywide Home Loans, Inc.*, 342 F. App'x 458, 460-461 (11th Cir. 2009).

Birster v. *Am. Home Mortg. Servicing, Inc.*, 481 F. App'x 579, 580, 583 (11th Cir. 2012) (explaining that the defendant "was both attempting to enforce a security interest *and* collect a debt" when it sent a letter advising the borrowers that it "would proceed with foreclosure unless [they] cured the default by paying" a specified sum), with, *e.g.*, *Dunavant* v. *Sirote & Permutt, P.C.*, 603 F. App'x 737, 740 (11th Cir. 2015) (holding that the publication of foreclosure notices was solely enforcement of a security interest); *Saint Vil* v. *Perimeter Mortg. Funding Corp.*, 630 F. App'x 928, 931 (11th Cir. 2015) (holding that foreclosure notices were not debt collection when they "did not state a money amount, request payment, or explain how the debt could be settled" and thus could not "be interpreted as trying to induce payment of the debt"); *Tharpe* v. *Nationstar Mortg.*, 632 F. App'x 586, 587 (11th Cir. 2016); *Hampton-Muhamed* v. *James B. Nutter & Co.*, No. 15-15504, 2017 WL 1906654, at *2 (11th Cir. May 9, 2017). This middle position is in tension with the rule in the Third, Fourth, and Sixth Circuits that *any* attempt to foreclose (or to notify a consumer about a foreclosure) itself "directly or indirectly" attempts to collect debt; but the position is also at odds with the decision below, which requires, at a minimum, a "threat" or "demand [for] payment." App., *infra*, 12a.

Second, the confusion is equally pronounced in the Fifth Circuit. The court of appeals below counted the Fifth Circuit on the opposite side of the split (App., *infra*, 6a), but that circuit has not squarely settled the question. On the one hand, it has rejected *Hulse* in a published opinion: "the entire FDCPA can apply to a party whose principal business is enforcing security interests but who nevertheless fits § 1692a(6)'s definition of a debt collector." *Kaltenbach* v. *Richards*, 464 F.3d 524, 528-529 (5th Cir. 2006) (remanding for the district court to consider

whether the defendant initiating foreclosure satisfied that general definition). On the other hand, the circuit later interpreted *Kaltenbach* to "implicitly recogniz[e] that a foreclosure is *not per se* FDCPA debt collection." *Brown* v. *Morris*, 243 F. App'x 31, 35 (5th Cir. 2007). District courts within the Fifth Circuit have accordingly suggested that "whether the initiation of foreclosure proceedings qualifies as collecting a debt under the FDCPA remains an open question." *Fath* v. *BAC Home Loans*, No. 3:12-cv-1755, 2013 WL 3203092, at *12 (N.D. Tex. June 25, 2013).[16]

This wide disconnect only underscores the deep confusion this issue has produced, and the obvious need for this Court's immediate intervention.

* * *

The conflict on the interpretation of "debt collector" is indisputable, mature, and entrenched. The debate has been fully exhausted at the district and circuit level. The stark division among the courts of appeals readily reflects the broader division in jurisdictions nationwide. The decision below was unanimous, and the Ninth Circuit refused to reconsider its split position before the full court; there is no realistic prospect that *multiple* courts of appeals will suddenly abandon their own precedent—especially where

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[16] See also, *e.g.*, *Green* v. *Brice, Vander Linden & Wernick, P.C.*, No. 3:11-cv-1498, 2015 WL 2167996, at *8 (N.D. Tex. May 7, 2015); *Brooks* v. *Flagstar Bank, FSB*, No. 11-67, 2011 WL 2710026, at *6 (E.D. La. July 12, 2011). The Fifth Circuit recently reaffirmed *Kaltenbach* without further addressing the issue. See *Mahmoud* v. *De Moss Owners Ass'n Inc.*, 865 F.3d 322, 330 (5th Cir. 2017). Judge Higginson's separate opinion suggests that the Ninth Circuit's decision is consistent with *Glazer*, *Wilson*, and *Piper* (*id.* at 336 & n.2)—*by endorsing the views of* Glazer, Wilson, *and* Piper. The Ninth Circuit, however, did not understand its decision the same way. See *Ho*, 858 F.3d at 577 n.11 (counting those very cases on the opposite side of the split).

each side has thoroughly confronted, and rejected, the opposing analysis.

This question is binary: If petitioner is right, courts and parties are wasting substantial time litigating whether the FDCPA even applies, rather than resolving disputes on the merits. If respondent is right, plaintiffs are filing hundreds or thousands of lawsuits that should never be filed (and wrongly *winning* in multiple circuits and dozens of district courts). Until this Court intervenes, the rampant confusion over this important threshold question will persist. The Court's immediate review is warranted.

B. The Question Presented Is Exceptionally Important And Frequently Recurring

The question presented is of exceptional legal and practical importance. Whether the FDCPA covers non-judicial foreclosures is a dispositive threshold issue. It dictates whether the FDCPA's protections apply in thousands of foreclosures with potentially trillions of dollars at stake. The sheer number of decisions from a multitude of jurisdictions underscores its obvious significance. As it now stands, however, there is a square split over the meaning of a core provision in the FDCPA, and countless courts and parties will continue wasting time and resources sorting out a binary question that begs for a clear answer.

Nor is there any hope of the issue resolving itself. As the discussion above illustrates, courts are well aware of the competing sides of the argument; they have repeatedly picked those sides without a uniform consensus emerging, and the confusion only promises to worsen now that the Tenth Circuit has weighed in. With tens of thousands of foreclosures initiated every month, and the stag-

gering magnitude of total household mortgage debt (exceeding ***$8 trillion***), these issues will continue to confound lower courts until this Court resolves the question.

In the meantime, the decision below threatens to deprive consumers of the FDCPA's protections in an area that hits (literally) closest to home. Congress passed the Act precisely because other "[e]xisting laws and procedures for redressing these injuries are inadequate." 15 U.S.C. 1692(b). The CFPB has confirmed the risks to consumers imposed by the Tenth Circuit's approach. In its statutorily-required 2013 annual report (see 15 U.S.C. 1692m(a)), the Bureau noted that "FDCPA coverage in the foreclosure context" is "an important issue on which the federal district courts have been divided," remarking that "[t]hese decisions have left consumers vulnerable to harmful collection tactics as they fight to save their homes from foreclosure." CFPB Report, *supra*, at 27. And borrowers are particularly vulnerable in the non-judicial foreclosure context, where judicial oversight is limited. See John Campbell, *Can We Trust Trustees? Proposals for Reducing Wrongful Foreclosures*, 63 Cath. U. L. Rev. 103 (2014). The FDCPA, by design, serves as a necessary backstop to these (otherwise) beneficial state procedures.

The decision below upsets Congress's scheme, deepens a conflict at the circuit level, and eliminates essential protections for vulnerable consumers. The issue has been treated from every conceivable angle, and it is not going anywhere. Indeed, in the past months alone, this issue has generated dozens of additional decisions, and multiple courts have confirmed the obvious conflict. *E.g.*, *Lapan* v. *Greenspoon Marder P.A.*, No. 5:17-cv-130, 2018 WL 1033224, at *3 (D. Vt. Feb. 22, 2018) ("the circuits that have dealt with the question are divided"); *Strader* v. *U.S. Bank Nat'l Ass'n*, No. 2:17-cv-684, 2018 WL 741425, at

*11 (W.D. Pa. Feb. 7, 2018); *Arias* v. *Select Portfolio Servicing, Inc.*, No. 1:17-CV-01130, 2017 WL 6447890, at *6 & n.3 (E.D. Ca. Dec. 18, 2017); *Carbone* v. *Caliber Home Loans, Inc.*, No. 15-CV-5190, 2017 WL 4157265, at *2 (E.D.N.Y. Sept. 19, 2017); *Thompke* v. *Fabrizio & Brook, P.C.*, No. 17-10369, 2017 WL 3479529, at *9 (E.D. Mich. Aug. 14, 2017). This Court alone can provide a clear answer. Further review is plainly warranted.

C. This Case Is The Perfect Vehicle For Deciding The Question Presented

This case is the ideal vehicle for deciding this significant question. It arises on appeal from a motion to dismiss. App., *infra*, 1a-2a. It has no factual or procedural impediments. The question presented was subject to its own special round of briefing. *Id.* at 3a. The issue was outcome-determinative below: it was the sole basis for the dismissal, and the court of appeals expressly found that petitioner had otherwise stated a claim. *Id.* at 5a. Petitioner's pertinent allegations are straightforward and representative: he targeted a standard non-judicial foreclosure preceded by a standard foreclosure notice. *Id.* at 2a-3a. And Colorado's foreclosure scheme is typical of schemes nationwide; the decision turned on the panel's interpretation of the federal statute, not any "nuances" of state law. *Id.* at 5a-12a.

This case also avoids every single vehicle concern raised in *Ho*. See Br. in Opp. 9-21, *Ho* v. *ReconTrust Co., N.A.*, No. 17-278 (filed Oct. 23, 2017) (BIO).

*In *Ho*, the Ninth Circuit ultimately premised its holding on two *independent* grounds: (i) non-judicial foreclosure is not covered by the FDCPA; and (ii) the trustee was protected by the FDCPA's *exception* for activities "incidental to * * * a bona fide escrow arrangement." BIO 17-18. That latter, alternative ground is not present here.

The first question—which has squarely divided the circuits—is alone teed up for decision.

*In *Ho*, the original trustee also claimed it was protected by the same ground Wells Fargo (but not respondent) asserted below: the case concerned a debt that was not in default at the time it was obtained. (The trustee in *Ho* was appointed at the time the mortgage was originally executed.) See BIO 19. Here, by contrast, respondent was retained *after* the default. App., *infra*, 2a.

*In *Ho*, the trustee distinguished contrary circuit authority on the ground that each case involved law firms retained specifically to pursue the foreclosure, while *Ho* involved a "neutral trustee." BIO 9, 15-17. Here, again, the facts below map perfectly onto the facts of cases in other circuits: respondent, a law firm, was retained to pursue a non-judicial foreclosure. App., *infra*, 2a; BIO 16 ("each decision" involved "a law firm or lawyer working on behalf of a creditor").

*In *Ho*, California law strictly prohibited any deficiency judgment, and the trustee argued that this fact explained away the contrary rulings in other circuits. BIO 10-11. Here, by contrast, Colorado law permits a "separate action" to collect on the deficiency. App., *infra*, 8a-9a.[17]

*In *Ho*, the trustee emphasized the (supposedly) complex foreclosure scheme under California law. BIO 10. Here, the Tenth Circuit did not identify any unusual aspects of Colorado law that might cabin its decision. (There are none.)

*And, finally, in *Ho*, the Ninth Circuit remanded for further proceedings on a different federal claim, which the trustee argued might itself provide full relief and otherwise rendered the case interlocutory. BIO 21. Here, the

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[17] The trustee was wrong, but this case avoids that dispute.

case is final, and the only mechanism for relief is reversing on the question presented.

At bottom, the Tenth Circuit issued a comprehensive opinion that built upon the vast body of law regarding the question presented, exploring every aspect of the debate. The question is ideally presented. The arguments have been fully vetted and further percolation promises nothing but additional conflicts and wasteful litigation. The issue is ripe for review and cries out for a definitive resolution from this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2018

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 16-1330

DENNIS OBDUSKEY,
Plaintiff-Appellant,

v.

WELLS FARGO; WELLS FARGO BANK;
WELLS FARGO & CO; WELLS FARGO BANK NA;
WELLS FARGO HOME MORTGAGE;
MCCARTHY AND HOLTHUS LLP,
Defendants-Appellees.

Filed: January 19, 2018

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:15-CV-01734-RBJ)

Before MORITZ, KELLY, and MURPHY,
Circuit Judges.

OPINION

KELLY, Circuit Judge.

Plaintiff-Appellant Dennis Obduskey appeals from the district court's order granting Defendants-Appellees Wells Fargo and McCarthy and Holthus, LLP's motion

to dismiss numerous claims, including whether either party was liable as a "debt collector" under the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692–1692p. Obduskey v. Fargo, No. 15-CV-01734-RBJ, 2016 WL 4091174 (D. Colo. July 19, 2016). Having jurisdiction under 28 U.S.C. § 1291, we affirm.

Background

In 2007, Mr. Obduskey obtained a $329,940 loan from Magnus Financial Corporation to buy a home. The loan was secured by his property and was serviced by Wells Fargo. Aplee. Supp. App. 107. Mr. Obduskey eventually defaulted on the loan in 2009. Id. at 109. Several foreclosure proceedings were initiated over the following six years, none of which were completed. Mr. Obduskey's loan remains in default.

In 2014, Wells Fargo hired McCarthy and Holthus, LLP (McCarthy), a law firm, to pursue a non-judicial foreclosure on Mr. Obduskey's home. McCarthy initially sent Mr. Obduskey an undated letter stating that McCarthy "MAY BE CONSIDERED A DEBT COLLECTOR ATTEMPTING TO COLLECT DEBT." Id. at 127. The letter explained that McCarthy was "instructed to commence foreclosure against" Mr. Obduskey's home. Id. It referenced the amount owed and noted the current creditor as Wells Fargo. Id. Mr. Obduskey apparently responded to the letter disputing the debt, id. at 124; however, instead of replying to his letter, McCarthy initiated a foreclosure action in May of 2015.[1] Mr. Obduskey then filed this action claiming (1) a violation of the Fair Debt

[1] McCarthy apparently responded to the letter on August 4, 2015, almost one year after Mr. Obduskey's initial letter. Aplt. Reply Br. to Aplee. Jt. Supp. Br. Ex. 3.

Collection Practices Act; (2) a violation of the Colorado Consumer Protection Act; (3) defamation; (4) extreme and outrageous conduct—emotional distress; and (5) commencement of an unlawful collections action. Aplee. Supp. App. at 21–27.

Wells Fargo and McCarthy filed motions to dismiss, which the district court granted on all claims. Obduskey, 2016 WL 4091174, at *8. Regarding the FDCPA claim, the district court held that Wells Fargo was not liable because it began servicing the loan prior to default. Id., at *3. It also held that McCarthy was not a "debt collector" because "foreclosure proceedings are not a collection of a debt," but it noted that "not all courts have agreed" on whether foreclosure proceedings are covered under the FDCPA. Id. To settle this confusion, we asked both parties to provide supplemental briefing on the issue. We now hold that the FDCPA does not apply to non-judicial foreclosure proceedings in Colorado.

Discussion

We review the grant of a motion to dismiss de novo. Khalik v. United Air Lines, 671 F.3d 1188, 1190 (10th Cir. 2012). We begin with the FDCPA claim against Wells Fargo and McCarthy.

I. Fair Debt Collection Practices Act

The Fair Debt Collection Practices Act was enacted, in part, to "eliminate abusive debt collection practices by debt collectors." 15 U.S.C. § 1692(e) (2012). It prohibits "abusive, deceptive, and unfair debt collection practices," such as late-night phone calls or falsely representing to a consumer about the amount of debt owed. Id. §§ 1692(a), 1692c, 1692e. To prevail under the FDCPA, a plaintiff must prove that the defendant is a "debt collector" who is

trying to collect a "debt" from the plaintiff in violation of some provision of the FDCPA. A "debt collector" is defined as "any person ... who regularly collects or attempts to collect, directly or indirectly, debts owed or due ... another." Id. § 1692a(6). "Debt" is further defined as "any obligation ... to pay money." Id. § 1692a(5).

On appeal, Mr. Obduskey claims numerous violations of the FDCPA including that Wells Fargo and McCarthy violated § 1692g by failing to "respond to a properly delivered notice requesting debt validation."[2] Aplt. Br. at 18–21.

A. Wells Fargo Is Not a Debt Collector

The district court held that Wells Fargo was not a debt collector because "Mr. Obduskey was not in default when ... Wells Fargo began servicing the loan or when it became the assignee of the debt." Obduskey, 2016 WL 4091174, at *3. We agree. The FDCPA excludes "any person collecting or attempting to collect any debt ... which was not in default at the time it was obtained by such person." 15 U.S.C. § 1692(a)(6)(F). Furthermore, the Senate Report notes that "the committee does not intend the definition [of debt collector] to cover ... mortgage service companies and others who service outstanding debts for others, so long as the debts were not in default when taken for servicing." S. Rep. No. 95-382, at 3–4 (1977). While Mr. Obduskey does allege that Wells Fargo sent him confusing information concerning whether Wells Fargo was the servicer of the loan or whether it actually owned the loan, Mr. Obduskey admits that Wells Fargo

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[2] Mr. Obduskey also claims violations of §§ 1692c (communicating with third party), 1692d (harassment), 1692e (false or misleading representations), and 1692f (unfair practices). Aplt. Br. at 21.

began servicing the loan before he went into default and that it continued to do so after he defaulted. See Aplee. Supp. App. at 12, ¶ 5, at 14, ¶ 14. Therefore, Wells Fargo is not a "debt collector" under the FDCPA. See Perry v. Stewart Title Co., 756 F.2d 1197, 1208 (5th Cir. 1958).

B. McCarthy Is Not a Debt Collector

McCarthy argues that we should affirm the district court's dismissal because Mr. Obduskey has failed to adequately allege a claim against it under the FDCPA. While Mr. Obduskey's complaint is far from perfect, we find that he has sufficiently pled that McCarthy failed to verify Mr. Obduskey's debt after it was disputed, in violation of § 1692g. See Aplee. Supp. App. at 16, ¶¶ 21–23. McCarthy also claimed for the first time in oral argument that Mr. Obduskey had waived the FDCPA claim against it by failing to raise it in the opening brief. We disagree. Mr. Obduskey specifically argues in his opening brief that McCarthy "violated the FDCPA by ignoring [a] valid written request related to verification of the debt and continued to collect." Aplt. Br. at 18. Regardless, we hold that McCarthy is not a debt collector for purposes of the FDCPA.

1. The FDCPA Does Not Cover Non-Judicial Foreclosure Proceedings

Whether the FDCPA applies to non-judicial foreclosure proceedings has divided the circuits. The Ninth Circuit, along with numerous district courts, has held that non-judicial foreclosure proceedings are not covered under the FDCPA. Vien-Phuong Thi Ho v. ReconTrust Co., 858 F.3d 568 (9th Cir. 2016) (Ho). The Fourth, Fifth, and Sixth Circuits, as well as the Colorado Supreme Court,

have held that they are covered. Wilson v. Draper & Goldberg, P.L.L.C., 443 F.3d 373 (4th Cir. 2006); Kaltenbach v. Richards, 464 F.3d 524 (5th Cir. 2006); Glazer v. Chase Home Fin. LLC, 704 F.3d 453 (6th Cir. 2013); Shapiro & Meinhold v. Zartman, 823 P.2d 120 (Colo. 1992) (en banc). The Tenth Circuit has been presented with this issue twice but has declined to address it because of pleading deficiencies in the complaint. See Burnett v. Mortg. Elec. Registration Sys., Inc., 706 F.3d 1231, 1239 (10th Cir. 2013); Maynard v. Cannon, 401 F. App'x 389, 395 (10th Cir. 2010). While there arguably may be some deficiencies in Mr. Obduskey's complaint, to provide clarity in this circuit, we address this issue.[3] Compare Huckfeldt v. BAC Home Loans Servicing, LP, 2011 WL 4502036, at *5 (D. Colo. Sept. 29, 2011) (finding that Colorado non-judicial foreclosure proceeding falls under the FDCPA), with Schwitzer v. Wells Fargo Bank, N.A., 2013 WL 607832, at *5 (D. Colo. Feb. 19, 2013) ("[T]he vast majority of courts, especially in this District, have found that foreclosure activities are outside the scope of the FDCPA.").

a. Plain Language of the Statute

"[I]t is our primary task in interpreting statutes to determine congressional intent, using traditional tools of

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[3] This confusion is also apparent in the Colorado Rule 120 Committee Comment: "There was considerable debate concerning whether the Federal 'Fair Debt Collection Practices Act' is applicable to a C.R.C.P. 120 proceeding. Rather than attempting to mandate compliance with that federal statute by specific rule provision, the Committee recommends that a person acting as a debt collector in a matter covered by the provisions of the Federal 'Fair Debt Collection Practices Act' be aware of the potential applicability of the Act and comply with it, notwithstanding any provision of this Rule." C.R.C.P. 120, Committee Comment to 1989 Amendment.

statutory construction." Coffey v. Freeport McMoran Copper & Gold, 581 F.3d 1240, 1245 (10th Cir. 2009) (quoting Russell v. United States, 551 F.3d 1174, 1178 (10th Cir. 2008)). Our first task is always to examine the language of the statute. Woods v. Standard Ins. Co., 771 F.3d 1257, 1265 (10th Cir. 2014). When that language is clear, we ordinarily end our analysis. Id. If, however, the language leaves us uncertain, we turn to the legislative history and policy of the statute to deduce Congress's intent. Id.

McCarthy argues that the plain language of the FDCPA dictates that it is not a "debt collector." Relying principally on the Ninth Circuit's decision in Vien-Phuong Thi Ho v. ReconTrust Co., 858 F.3d 568 (9th Cir. 2016), it argues that because debt is synonymous with "money," the FDCPA "imposes liability only when an entity is attempting to collect" money. 858 F.3d at 571. Because enforcing a security interest is not an attempt to collect money from the debtor, and the consumer has no "obligation . . . to pay money," non-judicial foreclosure is not covered under the FDCPA. Id. at 572 (quoting 15 U.S.C. § 1692a(5)). We have previously seemed to endorse such a view, see Burnett, 706 F.3d at 1239, and now endorse it fully. Entities engaged in non-judicial foreclosure actions in Colorado are not debt collectors under the FDCPA.[4]

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[4] A casual reading of the definition of debt collector may lead some to conclude that those who enforce security interests are only covered under § 1692(f) of the act and nowhere else. See 15 U.S.C. § 1692(a)(6) ("For the purpose of section 1692f(6) of this title, such term also includes any person who[se] . . . business the principal purpose of which is the enforcement of security interests."). Upon closer examination,

Mr. Obduskey relies upon the Sixth Circuit's decision in Glazer v. Chase Home Fin. LLC, 704 F.3d 453 (6th Cir. 2013), in support of his contrary position. That court held that a non-judicial mortgage foreclosure was covered under the FDCPA because the "ultimate purpose of a foreclosure action is the payment of money," and "every mortgage foreclosure, judicial or otherwise, is undertaken for the very purpose of obtaining payment on the underlying debt, either by persuasion (i.e., forcing a settlement) or compulsion (i.e., obtaining a judgment of foreclosure, selling the home at auction, and applying the proceeds from the sale to pay down the outstanding debt)." 704 F.3d at 461, 463.

We disagree. There is an obvious and critical difference between judicial and non-judicial foreclosures—"[a] non-judicial foreclosure differs from a judicial foreclosure in that the sale does not preserve to the trustee the right to collect any deficiency in the loan amount personally against the mortgagor." Burnett, 706 F.3d at 1239 (emphasis added) (quoting Maynard, 401 F. App'x at 391–92). Colorado follows this general rule and allows a creditor to collect a deficiency only after the non-judicial foreclosure sale and through a separate action. See Colo. Rev. Stat. §

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however, § 1692f(6) prohibits "dispossession or disablement of property" when the security enforcer has no "present right to possession of the property," or when the enforcer has no "present intention to take possession of the property." A non-judicial foreclosure proceeding does not fit this bill—Wells Fargo has no present right to possession of the property nor could they take possession of the property. It is the public trustee who holds the deed of trust and sells the property. See Colo. Rev. Stat. §§ 38-38-101, -105. Therefore, because non-judicial foreclosure actions do not fall within this section, they also do not fall under this sub-definition in 1692a(6).

38-38-106(6) (2017); Bank of Am. v. Kosovich, 878 P.2d 65, 66 (Colo. App. 1994).

While judicial mortgage foreclosures may be covered under the FDCPA because of the underlying deficiency judgment, see Maynard, 401 F. App'x at 394, a non-judicial foreclosure proceeding is not covered because it only allows "the trustee to obtain proceeds from the sale of the foreclosed property, and no more." Burnett, 706 F.3d at 1239 (quoting Maynard, 401 F. App'x at 391–92). Had McCarthy attempted to induce Mr. Obduskey to pay money by threatening foreclosure, the FDCPA might apply. See Burnett, 706 F.3d at 1239 ("[T]he initiation of foreclosure proceedings may be intended to pressure the debtor to pay her debt."); Rousseau v. Bank of N.Y., 2009 WL 3162153, at *9 (D. Colo. Sept. 29, 2009); see also Ho, 858 F.3d at 573 ("If entities that enforce security interests engage in activities that constitute debt collection, they are debt collectors.").

Glazer and other courts have also relied on § 1692i—"Legal actions by debt collectors"—as evidence that Congress intended the FDCPA to apply to mortgage foreclosures. See 704 F.3d at 462. Section 1692i is a venue provision. It requires "[a]ny debt collector who brings any legal action on a debt against any consumer . . . to enforce an interest in real property securing the consumer's obligation" to file in the judicial district where the property is located. 15 U.S.C. § 1692i(a)(1). The Glazer court noted that while this section

> does not speak in terms of debt collection, it applies only to "debt collectors" as defined in the first sentence of the definition, id. § 1692a(6), which does speak in terms of debt collection. This suggests that filing any type of mortgage foreclosure

> action, even one not seeking a money judgment on the unpaid debt, is debt collection under the Act.

704 F.3d at 462 (footnote omitted). We again disagree. Section 1692i by its very terms applies only to those who are originally debt collectors under § 1692a(6)—which McCarthy is not. It furthermore covers only "action[s] to enforce an interest in real property." 15 U.S.C. § 1692i(a)(1) (emphasis added). "Action" is generally understood to imply a "judicial proceeding," Action, Black's Law Dictionary (10th ed. 2014), and a non-judicial proceeding plainly does not fall under this definition.

b. Policy Considerations

While we find that the plain language of the statute dictates our decision, policy considerations further support it. If the FDCPA applied to non-judicial foreclosure proceedings in Colorado, it would conflict with Colorado mortgage foreclosure law. McCarthy suggests two such conflicts:

> [1.] C.R.C.P. 120(a) requires foreclosing entities to provide notice of the foreclosure to any party that may have acquired an interest in the property, which is inconsistent with the FDCPA's prohibition on communicating with third parties about the debt. See 15 U.S.C. § 1692c(b).
>
> [2.] [T]he FDCPA mandates that a debt collector must cease all direct communications with the borrower when the collector knows the borrower is represented by an attorney, see 15 U.S.C. § 1692c(a)(2), but C.R.C.P. 120(b) requires the foreclosing entity to post notice relating to the non-ju-

> dicial foreclosure on the door of the subject property and mail it directly to the mortgagor regardless of representation.

Aplee. Supp. Reply Br. at 7–8. McCarthy sums it up as follows: "If the FDCPA applies to these communications, then a foreclosing entity could not initiate non-judicial foreclosure in Colorado without violating federal law." Id. at 8.

We start with the assumptions that (1) "[i]n areas of traditional state regulation . . . a federal statute has not supplanted state law unless Congress has made such an intention 'clear and manifest,'" Bates v. Dow Agrosciences LLC, 544 U.S. 431, 449 (2005) (quoting N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995)), and (2) that mortgage foreclosure is "an essential state interest," BFP v. Resolution Tr. Corp., 511 U.S. 531, 544 (1994). Our reading of the plain language is bolstered by the fact that we find no "clear and manifest" intention on the part of Congress to supplant state non-judicial foreclosure law.[5] Indeed, many of the conflicts noted above are designed to protect the consumer, see Plymouth Capital Co. v. Dist. Court of Elbert County, 955 P.2d 1014, 1015 (Colo. 1998) ("Through creation of a public trustee's office, the General Assembly sought to ensure the protection of debtors while maintaining a speedy, efficient procedure for creditors."), and preempting them under the FDCPA would seem to both undermine their purpose as well as the pur-

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[5] For example, the word "foreclosure" is not mentioned once in either the statute or the legislative history.

pose of the FDCPA. See 15 U.S.C. § 1692 (stating the purpose of the FDCPA is "to promote consistent State action to protect consumers against debt collection abuses").

Some courts (reaching a contrary conclusion) have expressed concern that if the FDCPA does not apply to non-judicial foreclosure proceedings, it would immunize debt secured by real property where foreclosure was used to collect the debt. See Wilson, 443 F.3d at 376; Piper v. Portnoff Law Assocs., Ltd., 396 F.3d 227, 236 (3d Cir. 2005).

This proves too much. First, our holding is limited to non-judicial foreclosure proceedings and does not include judicial foreclosure actions. Second, our holding is also limited to the facts of the case. Whether or not more aggressive collection efforts leveraging the threat of foreclosure into the payment of money constitute "debt collection" is left for another day. See Maynard, 401 F. App'x at 395; Gburek v. Litton Loan Servicing LP, 614 F.3d 280, 385 (7th Cir. 2010) ("[T]he absence of a demand for payment is just one of several factors that come into play in the commonsense inquiry of whether a communication from a debt collector is made in connection with the collection of any debt."). In this case, however, the answer is clear—McCarthy did not demand payment nor use foreclosure as a threat to elicit payment. It sent only one letter notifying Mr. Obduskey that it was hired to commence foreclosure proceedings. Mr. Obduskey is, of course, free to contest this foreclosure in a Rule 120 proceeding, see C.R.C.P. 120(d); however, we hold that McCarthy's mere act of enforcing a security interest through a non-judicial foreclosure proceeding does not fall under the FDCPA.

II. Remaining Claims

Mr. Obduskey's remaining claims warrant summary treatment. As noted by the district court, Mr. Obduskey failed to "allege any specific monetary loss" from the alleged defamatory statements. Obduskey, 2016 WL 4091174, at *5. As such, Mr. Obduskey's defamation claim must fail. See Lind v. O'Reilly, 636 P.2d 1319, 1320 (Colo. App. 1981). Concerning the extreme and outrageous conduct claim, Mr. Obduskey has not alleged any act on the part of Wells Fargo or McCarthy that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community." Hewitt v. Pitkin Cty. Bank & Tr. Co., 931 P.2d 456, 459 (Colo. App. 1995).

Mr. Obduskey's limitations claim is also without merit. He claims that the mortgage foreclosure proceeding took place seven years after the note was accelerated and is barred by a six-year limitations period. But the applicable limitations period for foreclosure proceedings in Colorado is 15 years. Colo. Rev. Stat. § 38-39-205. Finally, because Mr. Obduskey's claim that Colorado's Rule 120 hearing is unconstitutional (because it does not provide a full and fair hearing and has no right of appeal) was not adequately pled in his complaint, he cannot raise it here.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 15-cv-01734-RBJ

DENNIS OBDUSKEY, an individual,
Plaintiff,

v.

WELLS FARGO, WELLS FARGO BANK,
WELLS FARGO & CO., WELLS FARGO BANK NA,
WELLS FARGO HOME MORTGAGE, and
MCCARTHY AND HOLTHUS LLP,
Defendants.

Filed: July 19, 2016

ORDER

R. BROOKE JACKSON, Judge.

This matter is before the Court on two motions to dismiss [ECF Nos. 14, 18] and a request for a temporary restraining order or preliminary injunction [ECF No. 39]. For the reasons described below, the Court grants both motions to dismiss and denies the motion for a temporary restraining order or preliminary injunction.

FACTS

In 2007 plaintiff Dennis Obduskey obtained a loan from Magnus Financial Corporation. ECF No. 1-16. The loan was in the amount of $329,940, and it was secured by his property at 132 Wagon Tongue Road in Bailey, Colorado (the property). *Id.* At some point Freddie Mac acquired the loan. *See* ECF No. 1-12. Defendant Wells Fargo Bank, N.A. (Wells Fargo) services the loan.[1] *See* ECF Nos. 1; 1-5.

Between 2008 and 2012 Wells Fargo offered Mr. Obduskey multiple loan modifications. ECF No. 1 at 2 ¶ 5. During this four-year span, plaintiff made 12 "trial payments" pursuant to three different modification offers. Wells Fargo accepted the payments and applied them as "late payments on the account and for other unspecified fees." *Id.* In 2009 Wells Fargo encouraged Mr. Obduskey to apply for a Home Affordable Modification program (HAMP) Loan Trial Period. *Id.* at 2 ¶ 2. Throughout this time Wells Fargo sent documents to plaintiff with "opposing messages within days of each other." *Id.* at 3 ¶ 5. Wells Fargo has "claimed numerous different owners of the note." *Id.* at 5 ¶ 14.

In June 2009 plaintiff defaulted on the loan, and Wells Fargo began non-judicial foreclosure proceedings. *Id.* at 16 ¶ 38; *see* ECF No. 1-28. Over the following six years, multiple foreclosure proceedings were initiated but not completed. *Id.* at 9 ¶ 30. On June 30, 2009 Mr. Obduskey

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[1] Wells Fargo claims that plaintiff also improperly named it as "Wells Fargo," "Wells Fargo Bank," "Wells Fargo & Co.," and "Wells Fargo Home Mortgage." ECF No. 14 at 1. The Court will refer to these entities as "Wells Fargo."

informed the Federal Trade Commission (FTC) of his ongoing problems with Wells Fargo during a public comment phase. *Id.* at 2 ¶ 3. In 2011 Wells Fargo failed to reply to issues contained in a qualified written request. *Id.* at 3–4 ¶ 7. In 2013 Wells Fargo or "contracted employees" left "door hangers" at Mr. Obduskey's home, "urging him to contact his mortgage servicer." *Id.* at 8 ¶ 26. Plaintiff alleges that each communication violated the Fair Debt Collection Practices Act. *Id.*

In 2014 Wells Fargo retained defendant McCarthy & Holthus, LLP (McCarthy) to pursue foreclosure of the property. *Id.* at 4–5 ¶¶ 12–13. Mr. Obduskey alleges that McCarthy failed to follow the requirements of the Fair Debt Collection Practices Act. *Id.* Mr. Obduskey received "undated" mailings from McCarthy in August 2014 advising plaintiff that the firm was serving as a debt collector. *Id.* at 7 ¶ 21. Plaintiff did not receive any validation from McCarthy before it initiated a new foreclosure action in May 2015. *Id.* at 7 ¶ 22. On June 11, 2015 plaintiff filed a complaint with the Consumer Financial Protection Bureau because of McCarthy's failure "to respond to a verification request response[.]" *Id.* at 4–5 ¶ 13. Mr. Obduskey states both that the firm "failed to provide an appropriate response" to him, and that "a written response by the Firm lacked the basic information necessary within a validation response." *Id.* at 7 ¶¶ 21–24.

Plaintiff's loan remains in default. *See* ECF No. 1-14. On August 12, 2015 plaintiff filed this suit, asserting five claims: (1) violation of the Fair Debt Collection Practices Act; (2) violation of the Colorado Consumer Protection Act; (3) defamation; (4) extreme and outrageous conduct; and (5) "commencement of an unlawful collections action." ECF No. 1 at 12–18. On September 25, 2015 Wells

Fargo moved to dismiss all of plaintiff's claims. ECF No. 14. On November 2, 2015, McCarthy filed a motion to dismiss plaintiff's case in its entirety. ECF No. 18. Both motions have been fully briefed. On July 11, 2016 plaintiff moved for a temporary restraining order and preliminary injunction to enjoin the foreclosure sale set for July 20, 2016. ECF No. 39.

ANALYSIS

I. Standard of Review.

To survive To survive a 12(b)(6) motion to dismiss, the complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). While the Court must accept the well-pleaded allegations of the complaint as true and construe them in the light most favorable to the plaintiff, *Robbins v. Wilkie*, 300 F.3d 1208, 1210 (10th Cir. 2002), purely conclusory allegations are not entitled to be presumed true. *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009). However, so long as the plaintiff offers sufficient factual allegations such that the right to relief is raised above the speculative level, he has met the threshold pleading standard. *See, e.g.*, *Twombly*, 550 U.S. at 556; *Bryson v. Gonzales*, 534 F.3d 1282, 1286 (10th Cir. 2008). Importantly, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Twombly*, 550 U.S. at 556 (internal quotation marks omitted); *accord Robbins v. Okla. ex. rel. Dep't of Human Servs.*, 519 F.3d 1242, 1247 (10th Cir. 2008). "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess

whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999) (internal citation omitted).

II. Fair Debt Collection Practices Act.

Mr. Obduskey's first claim is for violations of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692. ECF No. 12–13. Plaintiff contends that Wells Fargo and McCarthy violated multiple provisions of the FDCPA, "including, but not limited to" the following: communications with third parties (§ 1692c); harassment or abuse (§ 1692d); false or misleading representations (§ 1692e); unfair practices (§ 1692f); and validation of debts (§ 1692). *Id.* at 12 ¶ 6. Both defendants move to dismiss this claim. ECF Nos. 14 at 3–6; 18 at 4–6.

Congress enacted the FDCPA in 1977 "to eliminate abusive debt collection practices[.]" § 1692. The FDCPA regulates interactions between consumer debtors and "debt collectors." *Johnson v. Riddle*, 305 F.3d 1107, 1117 (10th Cir. 2002). A defendant can only be held liable if it is a debt collector within the meaning of the FDCPA. *James v. Wadas*, 724 F.3d 1312, 1315–16 (10th Cir. 2013).

A. Wells Fargo's Motion to Dismiss Plaintiff's FDCPA Claim

Wells Fargo raises a number of arguments for why plaintiff fails to state an FDCPA claim. ECF No. 3–6. First, Wells Fargo contends that it is not a debt collector as defined by the statute. *Id.* at 3–4. I agree. The statute's definition of "debt collector" excludes "any person collecting or attempting to collect any debt . . . which was not in default at the time it was obtained by such person . . . ." § 1692(a)(6)(F); *see Perry v. Stewart Title Co.*, 756 F.2d

1197, 1208 (5th Cir. 1985) ("The legislative history of section 1692a(6) indicates conclusively that a debt collector does not include the consumer's creditors, a mortgage servicing company, or an assignee of a debt, as long as the debt was not in default at the time it was assigned."). Courts have consistently held that a mortgage servicing company is not a debt collector within the meaning of the statute if the entity acquired the servicing rights before the loan was in default. *Solomon v. HSBC Mortg. Corp.*, 395 F. App'x 494, 495, 2010 WL 3069699, at *1 (10th Cir. 2010) (unpublished) (citing *Perry*, 756 F.2d at 1208); *Sudduth v. Citimortgage, Inc.*, 79 F. Supp. 3d 1193, 1197 (D. Colo. 2015).

Mr. Obduskey's allegations treat Wells Fargo as the servicer of his loan, and he does not claim that he was in default when Wells Fargo acquired its servicing rights. To the contrary, Mr. Obduskey alleges that he began interacting with Wells Fargo as early as 2008 when defendant first offered him a loan modification. He did not default on his loan until 2009. ECF No. 1 at 3 ¶ 5. Mr. Obduskey also alleges that Wells Fargo "has claimed numerous different owners of the note." *Id.* at 5 ¶ 14. First, he claims that he was told that the holder was "an unidentified 'investor,' which morphed to assignment to Wells Fargo via a Mortgage Electronic Registration Systems (MERS) representative on May 3, 2011, allegedly backdated to the date the loan was signed on May 31, 2007." *Id.* He also claims that Wells Fargo clarified on June 30, 2015 that Freddie Mac has owned the note since June 18, 2007. *Id.* To the extent that Mr. Obduskey bases his claim on Wells Fargo's acting an assignee of the note, he alleges that the assignment was "backdated" to 2007, which is before plaintiff defaulted.

Therefore, because Mr. Obduskey was not in default when either Wells Fargo began servicing the loan or when it became the assignee of the debt, Wells Fargo does not qualify as a debt collector under the FDCPA. *See Garrett v. BNC Mortg., Inc.*, 929 F. Supp. 2d 1120, 1128 (D. Colo. 2013). Mr. Obduskey's FDCPA claim against Wells Fargo is dismissed.

B. McCarthy's Motion to Dismiss

McCarthy also moves to dismiss the FDCPA claim on multiple grounds. ECF No. 18 at 4–6. Specifically, McCarthy argues that the FDCPA does not apply to non-judicial foreclosures, and therefore plaintiff's claim must fail. *Id.* at 5. I agree.

Not all courts have agreed "on whether and when foreclosure activities are covered" by the FDCPA. *Yokomizo v. Deutsche Bank Securities, Inc.*, No. 11-cv-01630-CMA-KLM, 2011 WL 5024899, at *4 (D. Colo. Nov. 30, 2011). However, the majority of courts, including this one, have found that foreclosure activities are outside the scope of the FDCPA. *Schwitzer v. Wells Fargo Bank, N.A.*, No. 12-cv-01367-RBJ-MJW, 2013 WL 607832, at *5 (D. Colo. Feb. 19, 2013); *Sudduth*, 79 F. Supp. 3d at 1197. Mr. Obduskey relies on cases outside of this district to support his position that the FDCPA covers non-judicial foreclosure. ECF No. 31 at 7.

Here, plaintiff alleges only that McCarthy took actions related to the filing of the non-judicial foreclosure action, contending that McCarthy failed to respond to a request for validation of the debt, and that the firm initiated a new foreclosure proceeding in May 2015. He does not allege that the law firm took any action to obtain payment on a debt. Moreover, plaintiff's allegation that he

received mailings from McCarthy advising him that the firm was serving as a debt collector is insufficient to state an FDCPA claim. "[T]he fact that an entity identifies itself as a debt collector, or tells a consumer that it is attempting to collect a debt, is not sufficient on its own to bring that entity within the purview of FDCPA." *Garrett*, 929 F. Supp. 2d at 1127 (citing *Maynard v. Cannon*, 401 Fed. App'x 389, 395, 2010 WL 4487113, at *5 (10th Cir. 2010) (unpublished) (a notice's language stating that it was "sent in an attempt to collect a debt" does not "inevitably lead to the conclusion that [defendant's] non-judicial foreclosure actions were FDCPA-covered debt collection activity."). In sum, the Court does not find any reason in plaintiff's complaint or briefs to support deviating from the majority view that foreclosure proceedings are not a collection of a debt. Mr. Obduskey's FDCPA against McCarthy is dismissed.

III. Colorado Consumer Protection Act.

Plaintiff's second claim is for a violation of the Colorado Consumer Protection Act (CCPA), C.R.S. § 6–1–101 *et seq.* In order to state a CCPA claim, a plaintiff must allege the following elements:

> (1) the defendant engaged in an unfair or deceptive trade practice; (2) the challenged practice occurred in the course of the defendant's business, vocation, or occupation; (3) the challenged practice significantly impacts the public as actual or potential consumers of the defendant's goods, services, or property; (4) the plaintiff suffered injury in fact to a legally protected interest; and (5) the challenged practice caused the plaintiff's injury.

Park Rise Homeowners Ass'n, Inc. v. Res. Const. Co., 155 P.3d 427, 434–35 (Colo. App. 2006).

Plaintiff claims that his allegations demonstrate "deceptive trade practices" in violation of the CCPA. ECF No. 1 at 14 ¶ 16. He further contends that defendants engaged "in these underhanded measures in an effort to increase revenues and obtain a competitive edge in the debt collection industry." *Id.* at 14 ¶ 17. Finally, he alleges that "numerous fees have been added to the original loan, but there is a complete failure" to explain such fees. *Id.* at 14 ¶ 18.

Among its many arguments for why plaintiff's CCPA claim should be dismissed, Wells Fargo contends that Mr. Obduskey does not satisfy the "public impact" requirement. ECF No. 14 at 6–7. I agree. In considering whether a challenged practice significantly impacts the public, courts consider the number of consumers directly affected, the "relative sophistication and bargaining power" of the affected consumers, and "evidence that the challenged practice has previously impacted other consumers or has the significant potential to do so in the future." *Id.*

Mr. Obduskey's complaint alleges private wrongs against him that only relate to his loan and his property. He fails to identify any public impact. *See Rhino Linings USA, Inc. v. Rocky Mountain Lining, Inc.*, 62 P.3d 142, 149 (Colo. 2003). Because plaintiff does not make any allegations, even bare conclusory ones, about how defendants' conduct has any public impact, the Court finds that his CCPA claim must fail. *See Owens v. Nationstar Mortgage LLC*, No. 14-cv-01434-PAB-KLM, 2015 WL 1345536, at *4 (D. Colo. March 23, 2015).

McCarthy moves to dismiss on similar grounds. ECF No. 18 at 6–7. Plaintiff's failure to allege a significant public impact remains fatal to his claim. Thus, Mr. Obduskey's CCPA claims are dismissed against both defendants.

IV. Defamation.

In Colorado, defamation is "a communication holding an individual up to contempt or ridicule that causes the individual to incur injury or damage." *Keohane v. Stewart*, 882 P.2d 1293 (Colo. 1994). In order to state a claim for defamation, a plaintiff must allege the following elements:

> (1) a defamatory statement concerning another; (2) published to a third party; (3) with fault amounting to at least negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special damages or the existence of special damages to the plaintiff caused by publication.

Lee v. Colorado Times, Inc., 222 P.3d 957, 961 (Colo. App. 2009) (internal citations omitted).

Plaintiff bases his defamation claim on two theories: (1) false credit reporting and (2) filing documents related to the foreclosure. ECF No. 1 at 14–15 ¶¶ 23–28. First, Mr. Obduskey alleges that Wells Fargo "caused derogatory information on Plaintiff's personal credit report." *Id.* at 15 ¶ 25. Plaintiff claims that Wells Fargo reported "'dispute resolved; customer disagrees,' when no dispute was ever resolved." *Id.* Second, plaintiff argues that Wells Fargo "directed their legal counsel to file a civil action for the foreclosure of a home which became a matter of public

record." *Id.* at 15 ¶ 23. The foreclosure appeared in local publications. *Id.* at 15 ¶ 24.

Wells Fargo moves to dismiss, arguing that plaintiff's defamation claim is barred by the statute of limitations, and Mr. Obduskey fails to allege that Wells Fargo made a false statement of a defamatory nature. ECF No. 14 at 11.

Even if the Court were to assume that plaintiff's claim is timely, Mr. Obduskey's defamation claim cannot survive a motion to dismiss because he fails to allege special damages. A published statement can be "libelous per se if it is defamatory on its face such that no extrinsic evidence is necessary to show either its defamatory nature or that it is of and concerning the plaintiff." *Lind v. O'Reilly*, 636 P.2d 1319, 1320 (Colo. App. 1981) (internal citations omitted) declined to follow on other grounds by *Lee*, 222 P.3d. Here, plaintiff does not contend that the statements are libelous per se. See ECF No. 1 at 14 ¶ 21.

Therefore, the statements must, if they are defamatory at all, be "libelous per quod, and they are therefore actionable only if special damages are pleaded and can be proved." *Lind*, 636 P.2d at 1320. Special damages are "limited to specific monetary losses, if any, which a plaintiff incurs as the result of publication of statements[.]" *Id.* at 1321. Such damages "do not include injuries to a plaintiff's reputation or feelings which do not result in specific monetary loss." *Id.* Finally, the damages "'must result from the conduct of a person other than the defamer or the one defamed and must be legally caused by the defamation.'" *Id.* (quoting Restatement (Second) of Torts § 575, Comment b (1977)).

Mr. Obduskey alleges that Wells Fargo published the statements to "deliberately cause damage to Plaintiff's reputation," and he claims that he is entitled to recover "actual damages, his actual damages trebled, plus reasonable attorney's fees and costs." ECF No. 1 at 15 ¶¶ 27–28. However, Mr. Obduskey fails to allege any specific monetary loss.

McCarthy moves to dismiss on similar grounds. Additionally, McCarthy contends that plaintiff "cannot recover for defamation with respect to reports made to credit bureaus because such a claim is preempted pursuant to 15 U.S.C. § 1681h(e)." ECF No. 18 at 8–9. The Court need not consider this argument because as discussed above, plaintiff's failure to allege special damages is fatal to his defamation claim.

For the reasons discussed above, Mr. Obduskey's defamation claim against Wells Fargo and McCarthy is dismissed.

V. Extreme and Outrageous Conduct.

Under Colorado law an entity that engages in extreme and outrageous conduct either recklessly or with the intent of causing an individual severe emotional distress can be held liable for damages if the victim does experience severe emotional distress. *See Coors Brewing Co. v. Floyd*, 978 P.2d 663, 665 (Colo. 1999). "Although the question of whether conduct is outrageous is generally one of fact to be determined by a jury, it is first the responsibility of a court to determine whether reasonable persons could differ on the question." *Culpepper v. Pearl St. Bldg., Inc.*, 877 P.2d 877, 883 (Colo. 1994). Colorado courts have erected a high bar for alleging an outrageous

conduct claim. *See Coors*, 979 P.2d at 665. The Colorado Supreme Court noted that

> "[l]iability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim 'outrageous!'"

Rugg v. McCarty, 476 P.2d 753 (Colo. 1970) (quoting the Restatement (Second) of Torts § 46 (1965)).

Plaintiff brings two theories about why defendants' conduct was "extreme and outrageous." First, Mr. Obduskey argues that he "has been forced to deal with three law firms regarding the debt," and that any "progress of stipulation and settlement has been lost." ECF No. 1 at 15 ¶ 32. Second, plaintiff contends that Wells Fargo "failed to provide accurate information pertaining to the current note holder." *Id.* at 16 ¶ 33. He concludes that "defendants engaged in the conduct recklessly or with the intent of causing Plaintiff [to] suffer distress." *Id.* at ¶ 34.

Wells Fargo contends that Obduskey fails to state a claim because he has not alleged any conduct that could be considered extreme or outrageous. ECF No. 14 at 12. Wells Fargo also argues that plaintiff's second theory regarding the holder of the note is "plainly false" based on Mr. Obduskey's supporting documents. *Id.*

The Court agrees that Mr. Obduskey's claim for extreme and outrageous conduct should be dismissed. Even when taking plaintiff's allegations as true and construing

them in his favor, Mr. Obduskey fails to identify conduct that satisfies this tort's high bar. There is nothing "so outrageous in character, and so extreme in degree" about Wells Fargo's working with three law firms over the course of this matter or with the alleged failure to provide accurate information about the note holder. Plaintiff fails to allege an "extreme act, both in character and degree" or a series of actions indicating the "infliction of severe mental suffering was calculated or recklessly and callously inflicted." *Gard v. Teletronics Pacing Sys., Inc.*, 859 F. Supp. 1349, 1354 (D. Colo. 1994). Moreover, courts in Colorado frequently dismiss outrageous conduct claims by borrowers against mortgagees or servicers. *See, e.g., Hewitt v. Pitkin County Bank & Trust Co.*, 931 P.2d 456, 459 (Colo. App. 1995) (no outrageous conduct claim where plaintiff alleged that a bank "accepted loan payments from him and then reneged on its promise not to commence foreclosure proceedings against him, and instead commenced such proceedings the very next day[.]"); *Christenson v. Citimortgage, Inc.*, No. 12-cv-02600-CMA-KLM, 2013 WL 5291943, at **18–19 (D. Colo. June 17, 2013), *report and recommendation rejected in part on other grounds*, 2013 WL 5291947 (D. Colo. Sept. 18, 2013) (allegations do not rise to the level of extreme or outrageous conduct despite the "inconvenience, pain, and suffering the threat of losing their home may have caused.").

McCarthy moves to dismiss, arguing that Mr. Obduskey's complaint fails to "identify wrongful conduct on the part of the Firm." ECF No. 18 at 9. Additionally, McCarthy contends that plaintiff does not allege any actions "that could be deemed extreme or outrageous." *Id.* As

discussed above, plaintiff's extreme and outrageous conduct claim is premised on having to "deal with three law firms regarding the debt" and Wells Fargo's providing inaccurate information about the note holder. Plaintiff does not allege that McCarthy did anything "extreme or outrageous" during its representation of Wells Fargo. Plaintiff claims only that McCarthy failed to respond to a request for validation of the debt, and that the firm initiated a new foreclosure proceeding in May 2015. Such allegations do not rise to the level of "extreme or outrageous" conduct. *See Mbaku v. Bank of America, N.A.*, No. 12-cv-00190-PAB-KLM, 2013 WL 425981, at *8 (D. Colo. Feb. 1, 2013) (holding that it was not extreme or outrageous to initiate foreclosure proceedings).

In sum, the Court finds that Mr. Obduskey fails to state a claim for extreme or outrageous conduct.

VI. Unlawful Collections Claim.

Plaintiff styles his fifth claim as "commencement of unlawful collections action." ECF No. 1 at 16. The Court is unaware of an "unlawful collections" tort under Colorado law. This appears to be a claim for wrongful foreclosure, which Colorado courts do not recognize. *See, e.g., Schwartz v. Bank of Am., N.A.*, No. 10-cv-01225-WYD-MJW, 2011 WL1135001, at **3–4 (D. Colo. Mar. 28, 2011) ("Colorado does not recognize a claim for damages based on 'wrongful foreclosure.'"). However, plaintiff's "unlawful collections" claim seems to rest on the notion that Wells Fargo's foreclosure action is time-barred and improper. ECF No. 1 at 16–18. The Court will consider his allegations related to these theories.

Plaintiff contends that Wells Fargo sent him a default letter on June 5, 2009. *Id.* at 16 ¶ 38. The foreclosure proceedings were initiated on May 12, 2015 when the Notice of Election and Demand (NED) was filed. *Id.* at 17 ¶ 44. Mr. Obduskey alleges that the foreclosure proceedings are untimely pursuant to the six-year statute of limitations under C.R.S. § 13–80–103.5. *Id.* at 17–18 ¶¶ 41, 45. Finally, Mr. Obduskey argues that defendants failed to properly commence a civil action because they did not file a complaint with a court. *Id.* at 17 ¶ 44.

Wells Fargo moves to dismiss, arguing that it timely and properly initiated its foreclosure action. ECF No. 14 at 14–15. Wells Fargo contends that the six-year statute of limitations in C.R.S. § 13–80–103.5 applies to the collection of a debt, and that the correct limitations period for foreclosure proceedings is 15 years pursuant to C.R.S. § 38–39–205. *Id.* at 14. Additionally, Wells Fargo argues that, even if the six-year limitations period applies, plaintiff tolled the statute of limitations by making voluntary payments during the HAMP trial periods. *Id.* Finally, Wells Fargo asserts that it properly initiated the foreclosure by filing and recording the NED, and that it did not have a responsibility to file a complaint. *Id.* at 14–15.

The Court agrees that plaintiff fails to allege that the foreclosure proceedings were untimely or improperly initiated. First, as Wells Fargo clarifies, it is not suing to enforce a promissory note, but rather is exercising its right to foreclose pursuant to a deed of trust. Therefore, the Court does not perceive any reason as to why the 15-year limitations period under § 38–39–205 would not apply. *See Mortgage Investments Corp. v. Battle Mountain Corp.*, 70 P.3d 1176, 1181 (Colo. 2003).

However, even if the general six-year limitations period did apply, the Court finds that plaintiff's voluntary payments tolled the statute of limitations. *Drake v. Tyner*, 914 P.2d 519, 522 (Colo. App. 1996) ("under certain circumstances, a new promise to pay a debt, an unqualified acknowledgment of a debt from which a promise to pay may be implied, or a part payment of a debt will start the limitations period running anew."). "In the case of a single debt not yet barred by the statute of limitations, partial payment alone tolls the statute of limitations." *Id.* (internal citations omitted). Here, plaintiff admits that he made 12 partial payments between 2008 and 2012. ECF No. 1 at 3 ¶ 5. He does not allege that the payments were involuntary. *See Drake*, 914 P.2d at 522 (partial payment is a "voluntary acknowledgment of the debt from which the law implies a new promise to pay the balance."). Therefore, each of the 12 payments restarted the clock, and the foreclosure action is timely by either measure.

The Court finds that plaintiff's second argument—that Wells Fargo failed to properly initiate its foreclosure proceedings because it failed to file a complaint—is without merit. Under Colorado law, foreclosures are initiated by the debt holder's filing of the NED. See C.R.S. §§ 38–38–101(1)(a). A court becomes involved later when the holder seeks an Order Authorizing Sale pursuant to Rule 120 of the Colorado Rules of Civil Procedure. *See* C.R.S. § 38–38–105(2)(a); C.R.C.P. 120(a), (d). Wells Fargo was not required to file a complaint in order to initiate the foreclosure proceedings.

McCarthy moves to dismiss on the same grounds. For the reasons just discussed, the Court concludes that the May 2015 foreclosure action was timely. In sum, the

Court finds that plaintiff's "wrongful collections action" fails.

VII. Plaintiff's Other Allegations.

Mr. Obduskey's complaint includes many other allegations that do not directly appear to support his five causes of action. For example, plaintiff alleges that Wells Fargo did not respond in a timely manner to his June 15, 2011 Qualified Written Response (QWR). ECF No. 1 at 3–4, ¶¶ 7–10. Even if the Court were to take this allegation as true, plaintiff does not bring a claim under the Real Estate Settlement Procedures Act (RESPA), which creates the obligation to respond to a QWR. Additionally, RESPA claims are subject to a three-year statute of limitations, so any claim would be untimely. 12 U.S.C. § 2614. Finally, plaintiff does not allege damages resulting from the failure to respond to the 2011 QWR. *See Henson v. Bank of Am.*, 935 F. Supp. 2d 1128, 1145–46 (D. Colo. 2013).

Additionally, Mr. Obduskey alleges that Wells Fargo "knew or should have known that the Colorado Rule 120 foreclosure process" deprives "consumers of due process." ECF No. 1 at 4 ¶ 10. Even if plaintiff had pled a constitutional claim, which he did not, neither defendant is a state actor against whom a constitutional claim can be brought. *See Lewis v. JP Morgan Chase Bank, N.A.*, No. 13-cv-01375-PAB-KLM, 2014 WL 1217948, at **3–6 (D. Colo. Mar. 24, 2014) (banks are not state actors when pursuing non-judicial foreclosures).

VIII. Motion for Temporary Restraining Order or Preliminary Injunction.

On July 11, 2016 plaintiff filed a motion seeking a temporary restraining order (TRO) or preliminary injunction

to prevent the foreclosure of the property. ECF No. 39 at 1. The foreclosure sale is scheduled for July 20, 2016. *Id.* at 3. The Court denies both requests. Because the Court finds that plaintiff fails to state a claim on which relief could be granted, he is not entitled to a TRO or a preliminary injunction. *See Gen. Motors Corp. v. Urban Gorilla, LLC*, 500 F.3d 1222, 1226 (10th Cir. 2007) (to obtain a preliminary injunction, a movant must first establish that he has "a substantial likelihood of success on the merit[.]").

ORDER

For the reasons stated above, defendant Wells Fargo's motion to dismiss [ECF No. 14] and defendant McCarthy and Holthus LLP's motion to dismiss [ECF No. 18] are GRANTED. Plaintiff Dennis Obduskey's motion for a temporary restraining order or preliminary injunction [ECF No. 39] is DENIED. Plaintiff's claims are dismissed with prejudice.

DATED this 19th day of July, 2016.

BY THE COURT:

/s/ R. Brooke Jackson
R. Brooke Jackson
United States District Judge

APPENDIX C

1. 15 U.S.C. 1692 provides:

Congressional findings and declaration of purpose

(a) Abusive practices

There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.

(b) Inadequacy of laws

Existing laws and procedures for redressing these injuries are inadequate to protect consumers.

(c) Available non-abusive collection methods

Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts.

(d) Interstate commerce

Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.

(e) Purposes

It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

2. 15 U.S.C. 1692a provides in pertinent part:

Definitions

As used in this subchapter–

* * * * *

(3) The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.

* * * * *

(5) The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

(6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the

collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. * * *

* * * * *

3. 15 U.S.C. 1692f provides in pertinent part:

Unfair practices

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

* * * * *

(6) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if–

(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;

(B) there is no present intention to take possession of the property; or

(C) the property is exempt by law from such dispossession or disablement.

* * * * *

4. 15 U.S.C. 1692i(a) provides in pertinent part:

Legal actions by debt collectors

(a) Venue

Any debt collector who brings any legal action on a debt against any consumer shall–

(1) in the case of an action to enforce an interest in real property securing the consumer's obligation, bring such action only in a judicial district or similar legal entity in which such real property is located * * *.

* * * * *

5. 15 U.S.C. 1692n provides:

Relation to State laws

This subchapter does not annul, alter, or affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to debt collection practices, except to the extent that

those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency. For purposes of this section, a State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection provided by this subchapter.

6. 15 U.S.C. 1692o provides:

Exemption for State regulation

The Bureau shall by regulation exempt from the requirements of this subchapter any class of debt collection practices within any State if the Bureau determines that under the law of that State that class of debt collection practices is subject to requirements substantially similar to those imposed by this subchapter, and that there is adequate provision for enforcement.

No. 17-1307

In the Supreme Court of the United States

DENNIS OBDUSKEY, PETITIONER

v.

MCCARTHY & HOLTHUS LLP, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether an entity that sends a notice stating that it will commence a non-judicial foreclosure to enforce a security interest under Colorado law thereby becomes a "debt collector," rather than an entity engaging in the "enforcement of security interests," for purposes of the Fair Debt Collection Practices Act.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner is Dennis Obduskey. Respondents are McCarthy & Holthus LLP and Wells Fargo Bank, N.A.

Although Wells Fargo Bank, N.A., was not named in the petition and petitioner's claim against it was resolved on other grounds, it is a proper respondent before the Court under Rule 12.6. Wells Fargo Bank, N.A., is a subsidiary of Wells Fargo & Company. Wells Fargo & Company has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Wells Fargo, Wells Fargo Bank, Wells Fargo Home Mortgage, and Wells Fargo & Company were improperly named below as defendants.

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In the Supreme Court of the United States

No. 17-1307

DENNIS OBDUSKEY, PETITIONER

v.

MCCARTHY & HOLTHUS LLP, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 879 F.3d 1216. The order of the district court (Pet. App. 14a-32a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 2018. The petition for a writ of certiorari was filed on March 13, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Properly understood, this case presents a narrow question tied to state law: whether a law firm that sent a notice stating it was initiating a non-judicial foreclosure to enforce a security interest under Colorado law thereby falls within the definition of "debt collector" in the Fair Debt Collection Practices Act (FDCPA). Petitioner obtained a loan that was secured by a residential property and serviced by a bank. After petitioner defaulted on the loan, the bank hired a law firm to pursue non-judicial foreclosure on petitioner's property. The law firm notified petitioner that it had been instructed to commence a foreclosure on the property. It then initiated a non-judicial foreclosure to conduct a sale of the property in accordance with Colorado law.

As is relevant here, petitioner filed suit to challenge the bank's and the law firm's actions under the FDCPA. The district court dismissed the claim against the law firm on the ground that, by merely commencing non-judicial foreclosure proceedings, it was not attempting to collect a debt and thus did not qualify as a "debt collector" as defined by the FDCPA. The court of appeals affirmed.

Petitioner now seeks this Court's review, alleging a circuit conflict on an issue of exceptional importance. But the court of appeals' carefully circumscribed decision, intertwined with state-law considerations, does not directly conflict with any decision of another federal court of appeals or a state court of last resort. Moreover, the court of appeals' decision lacks the broader significance that would warrant the Court's intervention, and this case is a poor vehicle in which to address any question concerning the application of the FDCPA in the context of non-judicial disclosure proceedings. The petition for a writ of certiorari should therefore be denied.

A. Background

1. The FDCPA bars "debt collector[s]" from engaging in certain practices while attempting to collect debts. 15 U.S.C. 1692c-1692h, 1692k; see 15 U.S.C. 1692(e). The FDCPA defines a "debt collector" as, *inter alia*, any entity that "regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another": *i.e.*, an entity whose overall practices involve sufficiently frequent debt collection. 15 U.S.C. 1692a(6); *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1721 (2017). It defines "debt," in turn, as an actual or alleged "obligation of a consumer to pay money." 15 U.S.C. 1692a(5). For purposes of certain specific prohibitions not at issue here, the FDCPA separately defines as a "debt collector" "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests." 15 U.S.C. 1692a(6).

The FDCPA excludes certain persons from the general definition of "debt collector." Of particular relevance here, the FDCPA provides that "debt collector" does not include "any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity * * * concerns a debt which was not in default at the time it was obtained by such person." 15 U.S.C. 1692a(6)(F)(iii).

2. This case concerns the actions of a law firm in initiating a non-judicial foreclosure under Colorado law. In Colorado, a creditor can proceed with either judicial or non-judicial foreclosure. A non-judicial foreclosure allows a property to be sold with a lesser degree of involvement by the courts. Under Colorado law, non-judicial foreclosure is available where a loan preauthorizes the sale of the property to pay up to the loan balance in the event of default. See Colo. R. Civ. P. 120(a). Colorado law sets out a

detailed statutory and procedural process for non-judicial foreclosure. See Colo. Rev. Stat. §§ 38-38-100.3 to 38-38-114; Colo. R. Civ. P. 120.

Unlike in most other States, the non-judicial foreclosure process in Colorado relies on a public trustee, an impartial party appointed by the governor, to conduct the sale. See Colo. Rev. Stat. §§ 38-38-101, 38-38-105, 38-38-108, 38-38-110; *Plymouth Capital Co.* v. *District Court*, 955 P.2d 1014, 1015-1017 (Colo. 1998). Upon default, the creditor or its attorney may file a "notice of election and demand" with the public trustee and provide documentation, including evidence of the debt. See Colo. Rev. Stat. § 38-38-101(1), (4). The public trustee then reviews the filing and, if the filing is complete, records the notice. See Colo. Rev. Stat. § 38-38-102(1). The creditor and public trustee must provide several notices to the debtor containing information about the proposed sale and the debtor's rights. See Colo. Rev. Stat. §§ 38-38-102.5, 38-38-103.

The creditor must also obtain an order from a state court authorizing the sale by establishing a "reasonable probability that a default justifying the sale has occurred." Colo. R. Civ. P. 120; see Colo. Rev. Stat. § 38-38-105. That allows a court, even in a non-judicial foreclosure, to address "issues related specifically to the existence of a default." *Plymouth Capital*, 955 P.2d at 1016. During that process, the debtor is entitled to additional notices and an opportunity to object to the sale. See Colo. R. Civ. P. 120(a)-(c). The creditor must provide notice directly to the debtor, even if the debtor is represented by counsel, as well as to any third parties that may have acquired an interest in the property. See Colo. R. Civ. P. 120(a), (b).

Once the sale is authorized, the public trustee advertises and conducts the sale. See Colo. Rev. Stat. § 38-38-

110. If the sale price of the property is less than the amount of outstanding debt secured by the property, the creditor may not seek to collect any deficiency from the borrower as part of the non-judicial foreclosure process; to obtain a deficiency payment, the creditor must file a separate judicial action. See Colo. Rev. Stat. § 38-38-106(6); *Bank of America* v. *Kosovich*, 878 P.2d 65, 66 (Colo. App. 1994).

B. Facts And Procedural History

1. In 2007, petitioner obtained a loan to buy a residential property in Bailey, Colorado. The loan was secured by the residential property and serviced by respondent Wells Fargo Bank, N.A. Petitioner defaulted on the loan in 2009. Pet. App. 2a, 15a; C.A. Supp. App. 107, 109.

In 2014, Wells Fargo hired respondent McCarthy & Holthus LLP, a law firm, to pursue a non-judicial foreclosure on the property. The allegations against McCarthy focus on an undated letter that it sent petitioner, in which it stated that it had been "instructed to commence foreclosure against the * * * property." McCarthy informed petitioner that it "may be considered a debt collector attempting to collect a debt." McCarthy further stated the amount owed to Wells Fargo; noted that it would assume the debt to be valid unless petitioner disputed the debt within thirty days; and warned that foreclosure could be commenced before the end of that period. C.A. Supp. App. 127.

Petitioner alleged that he responded to the letter, asking for verification of the debt, but that he did not receive any. Pet. App. 2a; C.A. App. 10.[1] Petitioner also "demand[ed]" that McCarthy "cease all unauthorized contact

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[1] On appeal, however, petitioner produced a letter from McCarthy dated August 4, 2015, providing verification. See Pet. App. 2a n.1; Pet. C.A. Supp. Reply Br., Ex. 3.

regarding th[e] debt" in accordance with "[f]ederal and Colorado law[]," and indicated that he was represented by counsel. C.A. Supp. App. 125.

In May 2015, McCarthy initiated a non-judicial foreclosure pursuant to Colorado law. Shortly thereafter, petitioner filed a complaint with the Consumer Financial Protection Bureau alleging that McCarthy had not responded to his verification request. To date, the sale of the property has not occurred. Pet. App. 2a, 16a.

2. On August 12, 2015, petitioner filed suit against respondents (as well as other improperly named entities) in the United States District Court for the District of Colorado, asserting various claims under the FDCPA and Colorado state law. Pet. App. 2a-3a, 16a. As to McCarthy, the complaint's allegations focused on its alleged failure to provide verification of the debt before commencing the non-judicial foreclosure. *Id.* at 16a; C.A. App. 9-10. As to Wells Fargo, the complaint's allegations focused primarily on its provision of allegedly "confusing information" before McCarthy was retained. Pet. App. 4a, 15a-16a; C.A. App. 5-12.

Respondents moved to dismiss the complaint, and the district court granted the motions. Pet. App. 3a, 32a. As to McCarthy, the district court held that it was not a "debt collector" under the FDCPA because the complaint "d[id] not allege that [it] took any action to obtain payment on a debt." *Id.* at 20a. The court rejected the contention that the foreclosure proceeding could itself constitute the "collection of a debt." *Id.* at 21a. The court added that the disclaimer in McCarthy's letter stating that it was serving as a debt collector was "insufficient to state an FDCPA claim." *Ibid.* The district court dismissed the FDCPA claim against Wells Fargo on the ground that it was not a "debt collector," citing the discrete statutory exclusion for "any person collecting or attempting to collect any debt

* * * which was not in default at the time it was obtained by such person." 15 U.S.C. 1692a(6)(F); Pet. App. 18a-20a.[2]

3. The court of appeals affirmed. Pet. App. 1a-13a. As a preliminary matter, the court of appeals agreed with the district court that Wells Fargo was entitled to invoke the statutory exclusion for persons who obtained debt before default, because petitioner had "admit[ted] that Wells Fargo began servicing the loan before he went into default." *Id.* at 4a-5a.[3]

As is relevant here, the court of appeals then addressed whether McCarthy qualified as a "debt collector" under the FDCPA. While noting that petitioner's complaint was "far from perfect," the court proceeded to consider whether McCarthy qualified as a "debt collector" because it had not previously addressed that question in the context of non-judicial foreclosure proceedings. Pet. App. 5a-6a.

The court of appeals explained that, under the "plain language" of the FDCPA, an entity qualifies as a debt collector when it is attempting to collect money from a debtor. Pet. App. 7a. Merely enforcing a security interest, the court continued, is not inherently an attempt to collect money; to the contrary, a consumer has no obligation to pay money in a non-judicial foreclosure proceeding. *Ibid.* The court deemed persuasive the Ninth Circuit's reasoning in its recent decision in *Ho* v. *ReconTrust Co., N.A.*, 858 F.3d 568, 571-572 (2016), cert. denied, 138 S. Ct. 504 (2017), which held that initiating a non-judicial

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[2] The district court dismissed petitioner's state-law claims on other grounds. See Pet. App. 21a-31a.

[3] Petitioner does not seek review of that holding in this Court, and the judgment in favor of Wells Fargo is therefore final. See Pet. 8 n.4.

foreclosure without seeking a payment of money does not render an entity a "debt collector" for purposes of the FDCPA. Pet. App. 7a.

The court of appeals declined to follow sweeping language in a Sixth Circuit decision that asserted that "*every* mortgage foreclosure, judicial or otherwise," triggers application of the FDCPA. Pet. App. 8a (quoting *Glazer* v. *Chase Home Finance LLC*, 704 F.3d 453, 463 (6th Cir. 2013)). The court of appeals observed that the foreclosure at issue in the Sixth Circuit's decision was a judicial foreclosure; "[t]here is an obvious and critical difference between judicial and non-judicial foreclosures," because a trustee in a non-judicial foreclosure cannot "collect any deficiency in the loan amount personally against the mortgagor." *Ibid.* (citation omitted).

According to the court of appeals, that distinction was significant under Colorado law, which requires a creditor to collect any deficiency in a separate action. Pet. App. 8a. Because the non-judicial foreclosure at issue would allow the public trustee only to "obtain proceeds from the sale of the foreclosed property, and no more," McCarthy's letter notifying petitioner about the non-judicial foreclosure did not constitute an attempt to seek the payment of money from petitioner. *Id.* at 9a (citation omitted).

In making that determination, the court of appeals emphasized that the FDCPA might apply if McCarthy had "demand[ed] payment" or "attempted to induce [payment] by threatening foreclosure." Pet. App. 9a, 12a. Here, however, petitioner did not allege that McCarthy had done either; instead, petitioner alleged simply that McCarthy had "sent * * * one letter notifying [petitioner] that it was hired to commence foreclosure proceedings." *Id.* at 12a.

The court of appeals observed that a contrary holding would create a conflict between the FDCPA and Colorado

law. Pet. App. 10a. As the court noted, Colorado law requires that notice be provided directly to a debtor (such as petitioner) who is represented by counsel, as well as to any interested third parties, in advance of a non-judicial foreclosure, while the FDCPA forbids such communications. *Id.* at 10a-11a. The court reasoned that Congress did not express a "clear and manifest" intention to supplant state law in an area of traditional state regulation, especially given that Colorado's provisions are designed to "*protect* the consumer." *Id.* at 11a (citation omitted). The court thus construed the FDCPA so that the "mere act of enforcing a security interest through a non-judicial foreclosure proceeding" under Colorado law did not constitute debt collection. *Id.* at 12a.

In conclusion, the court of appeals stressed the narrow scope of its holding, which was limited to non-judicial foreclosure proceedings and was "also limited to the facts of the case." Pet. App. 12a. The court made clear that it was not addressing whether an entity engaged in "more aggressive collection efforts" would qualify as a "debt collector" as defined in the FDCPA. *Ibid.* Accordingly, the court explained, its reasoning would not "immunize" entities in cases in which a foreclosure was used to collect a debt. *Ibid.* The court added that petitioner was still free to contest the non-judicial foreclosure in a proceeding under Colorado law. *Ibid.*

ARGUMENT

Petitioner asserts that this case presents a circuit conflict on a question of exceptional importance: namely, whether the FDCPA "applies to non-judicial foreclosure proceedings." Pet. i. But petitioner has not identified a square conflict on that question; in fact, none of the court of appeals decisions on which petitioner primarily relies even involved non-judicial foreclosure.

The court of appeals' decision in this case was narrow and fact-bound. The court of appeals held that McCarthy's act of sending a notice stating that it was initiating a non-judicial foreclosure under Colorado law, standing alone, did not render it a "debt collector" under the FDCPA. In so holding, the court of appeals expressly left open whether an entity that takes additional actions would qualify as a debt collector. The court of appeals' holding relates to a tiny portion of foreclosure-related activities and touches on an area in which debtors have ample other protections, as this case well illustrates. Nor is this case a suitable vehicle in which to review the question presented given the deficiencies in the complaint recognized by the court of appeals, which would effectively require the Court to consider the question in the abstract.

Just five months ago, the Court denied a petition for a writ of certiorari on a materially identical question, filed by the same counsel representing petitioner here. See *Ho* v. *ReconTrust Co., N.A.*, 138 S. Ct. 504 (2017). There is no valid reason for a different result in this case. The petition for a writ of certiorari should therefore be denied.

A. The Decision Below Does Not Squarely Conflict With Any Decision Of Another Court Of Appeals Or A State Court Of Last Resort

Petitioner contends (Pet. 11-19) that the decision below conflicts with several decisions of other courts of appeals and state courts of last resort. But none of those decisions squarely conflicts with the decision below. Not one of the published court of appeals decisions petitioner cites in asserting a direct conflict addressed non-judicial foreclosure proceedings. The two state-court decisions petitioner cites are similarly inapposite. Nor is any apparent disagreement in reasoning nearly as deep as petitioner suggests: the vast majority of the cited decisions

involve factual circumstances the decision below expressly did not reach. There is therefore no conflict that warrants this Court's review.

1. a. Petitioner contends (Pet. 11, 13, 15) that there is a "direct conflict[]" on the question presented between the decision below and decisions of the Third, Fourth, and Sixth Circuits. But petitioner has not identified a conflict among the courts of appeals on the question whether the FDCPA "applies to non-judicial foreclosure proceedings," Pet. i, for the simple reason that none of the published decisions from those circuits involved non-judicial foreclosures; all but one involved *judicial* (or quasi-judicial) foreclosures. See *McCray* v. *Federal Home Loan Mortgage Corp.*, 839 F.3d 354, 357 (4th Cir. 2016); *Kaymark* v. *Bank of America, N.A.*, 783 F.3d 168, 172-173 (3d Cir. 2015), cert. denied, 136 S. Ct. 794 (2016); *Glazer* v. *Chase Home Finance LLC*, 704 F.3d 453, 456 (6th Cir. 2013); *Wilson* v. *Draper & Goldberg, P.L.L.C.*, 443 F.3d 373, 375 (4th Cir. 2006). And the remaining decision did not involve a foreclosure proceeding at all. See *Piper* v. *Portnoff Law Associates*, 396 F.3d 227, 229-230 (3d Cir. 2005).

As petitioner appears to recognize in his question presented, the distinction between judicial and non-judicial foreclosure is critical to the FDCPA analysis, which turns on whether an entity was seeking to collect money from a debtor. See 15 U.S.C. 1692a(5) (defining "debt"); 15 U.S.C. 1692a(6) (defining "debt collector"). Judicial foreclosure generally permits a creditor to recover from the debtor the remaining deficiency on a debt in the foreclosure proceeding itself, whether through a deficiency decree or through some other mechanism provided by state law. See generally Grant S. Nelson & Dale A. Whitman, *Real Estate Finance Law* § 8.1, at 1041-1042 (6th ed. 2014) (Nelson & Whitman).

Accordingly, even if initiating a *judicial* foreclosure qualifies as debt collection under the FDCPA, initiating a non-judicial foreclosure plainly does not. A non-judicial foreclosure proceeding allows a creditor only to secure the sale of the property; it does not permit the creditor to obtain the payment of any money. See, *e.g.*, Colo. Rev. Stat. §§ 38-38-101, 38-38-106(6). If initiating a non-judicial foreclosure were sufficient to make an entity a debt collector, it would render meaningless the FDCPA's distinction between "the enforcement of [a] security interest[]" and "the collection of a[] debt[]." 15 U.S.C. 1692a(6).

Recognizing that distinction, the court of appeals in this case emphasized the "obvious and critical difference between judicial and non-judicial foreclosures," and it expressly limited its holding to non-judicial foreclosures. Pet. App. 8a-9a, 12a. The court thus left open the question addressed in the cases on which petitioner primarily relies.

b. Moreover, none of the court of appeals decisions cited by petitioner is on point, because all of them involve the legal regimes of other States. Colorado law was critical to the analysis below. The court of appeals specifically distinguished the Colorado non-judicial foreclosure regime from the regime at issue in *Glazer*, *supra*. Pet. App. 8a. And the court concluded that applying the FDCPA here would displace aspects of the Colorado non-judicial foreclosure scheme designed to "*protect* the consumer" in a core area of state concern. *Id.* at 10a-11a. Colorado law requires that notice be provided directly to a debtor, like petitioner, who is represented by counsel, as well as to any interested third parties, in advance of a non-judicial foreclosure, see Colo. R. Civ. P. 120(a)-(b), while the FDCPA forbids such communications, see 15 U.S.C. 1692c(a)(2), (b).

Critically, those provisions are particular to Colorado law. Other States have "varying types and degrees of notice" requirements, many of which are far less stringent than Colorado's. Nelson & Whitman § 7:20, at 944. Only a few States require direct notice to all interested third parties, and some do not require direct notice to anyone. See *ibid.* Applying the FDCPA to foreclosure proceedings governed by the laws of those States may well pose little or none of the conflict with state law found by the court below.

c. In addition, nearly all of the court of appeals decisions on which petitioner relies involved entities that did more than merely initiate a foreclosure proceeding in accordance with the relevant state law. The entities in those cases demanded payment from the debtor, thereby seeking to collect a debt. Those cases thus implicate a distinct question—whether an entity that engages in actual debt collection is exempt from the FDCPA because those efforts arise in connection with a foreclosure proceeding.

By contrast, McCarthy made no express or implicit demands for payment. See Pet. App. 9a, 12a. This case thus implicates an entirely different question: whether initiating a non-judicial foreclosure under Colorado law *itself* constitutes debt collection. The Tenth Circuit expressly "left for another day" whether additional activity that amounted to an "attempt[] to induce [petitioner] to pay money" would have rendered McCarthy a debt collector. *Ibid.*

2. Even beyond the foregoing distinctions, petitioner errs in asserting that there is a "clear and undeniable" circuit conflict on the question presented. Pet. 11. To be sure, the reasoning of the decision below differs in some respects from that of some of the decisions petitioner

cites. But those decisions involved sharply different factual circumstances, and their holdings are entirely consistent with the holding below.

a. Petitioner argues that the court of appeals' decision conflicts with two Third Circuit decisions. See Pet. 15-16 & n.10. Petitioner is incorrect.

In *Kaymark*, *supra*, the defendant law firm brought a *judicial* foreclosure action under Pennsylvania law. See 783 F.3d at 172-173. It sought not only to liquidate the underlying property, but also to collect fees for legal services not yet performed on behalf of the creditor—a patent effort to obtain money from the debtor in the context of a judicial foreclosure proceeding. See *ibid.* Given those facts, the Third Circuit easily deemed the law firm a "debt collector" under the FDCPA; it declined to "immuniz[e]" the firm's efforts to collect money simply because they occurred in the context of a foreclosure "litigation." *Id.* at 176-177, 179. *Kaymark* is thus consistent with the decision below, which "left for another day" whether additional activity that amounted to an "attempt[] to induce [petitioner] to pay money" would have rendered McCarthy a debt collector. Pet. App. 9a, 12a.

The other Third Circuit decision the petitioner cites, *Piper*, is even further afield. The defendant law firm in that case was retained by a municipality to collect payment for overdue water and sewage obligations. See 396 F.3d at 229. The law firm sent letters urging the debtors to make payment directly to it and threatening to file a lien against the debtors' property. See *id.* at 229-230. It then acted on that threat and continued to "demand[] payment" in letters and phone calls, using the lien as leverage. *Id.* at 230. The law firm's communications sought "personal payment of money," and the law firm readily admitted it was "not looking to liquidate the real property" but rather to cause the debtors to "pay the money."

Id. at 233 (citation omitted). In light of those facts, it is unsurprising that the Third Circuit deemed the law firm a "debt collector," reasoning that enforcing the security did not "immun[ize]" the defendant where its "activities fit the statutory definition of a 'debt collector.'" *Id.* at 234, 236. Here, by contrast, McCarthy did not attempt to collect money from petitioner; as a result, it did not qualify as a "debt collector" under the FDCPA's general definition. See Pet. App. 7a-9a, 12a.

b. Both Fourth Circuit decisions cited by the petitioner are similarly inapposite. To begin with, both cases involved quasi-judicial foreclosure actions filed in court, which allowed the recovery of money from the debtor. See *McCray*, 839 F.3d at 357; *Wilson*, 443 F.3d at 375; Appellee Br. at 2, *Wilson*, *supra*; Md. Rules 14-201(b), 14-207.1(a), 14-212(b); Md. Real Prop. Code § 7-105.13. More broadly, the entities at issue in those cases took concrete steps beyond merely enforcing a security interest—steps that constituted clear efforts to collect money owed.

In *Wilson*, the defendant law firm sent the debtor a letter that "contained a specific request for money to 'reinstate the [mortgage] account.'" 443 F.3d at 376. The same letter "instructed" the borrower to pay her debt, along with foreclosure fees, "by cashiers check made payable to the [creditor] and to send it to [the defendant]." *Id.* at 377. The Fourth Circuit explained that the FDCPA "does not exclude those who enforce security interests but who also fall under the general definition of 'debt collector.'" *Id.* at 378.

Similarly, in *McCray*, the Fourth Circuit addressed defendants retained by the creditor to "collect" on the defaulted amount where the record demonstrated that the defendants "were seeking repayment" of the debt. 839 F.3d at 360-361. Indeed, the defendants expressly threatened foreclosure in an "attempt[] to collect on a debt" by

stating, *inter alia*, that "a foreclosure action may be filed in court" if "[the borrower] did not bring the loan current." *Id.* at 361 (internal quotation marks omitted).

Both cases thus involved demands for payment from the debtor. Here, by contrast, McCarthy "did not demand payment nor use foreclosure as a threat to elicit payment." Pet. App. 12a. And the court of appeals expressly reserved the possibility that, if McCarthy had done so, it would in fact qualify as a debt collector. *Ibid.*

c. The Sixth Circuit's decision in *Glazer*, *supra*, is also inapposite because it involved judicial foreclosure proceedings. See 704 F.3d at 456. The Sixth Circuit held that filing a judicial foreclosure action in Ohio state court amounted to an effort to collect debt under the FDCPA. See *id.* at 464-465.

To be sure, the Sixth Circuit also stated that "every mortgage foreclosure, judicial or otherwise," constitutes "debt collection under the Act." *Glazer*, 704 F.3d at 461-462. But that statement is plainly dictum and would not bind subsequent Sixth Circuit panels in cases involving non-judicial foreclosure proceedings. Moreover, in so stating, the Sixth Circuit relied on generalizations about foreclosure proceedings that do not apply to the Colorado non-judicial foreclosure proceeding at issue here. In particular, the Sixth Circuit explained that, even if the defendants had not sought a deficiency judgment, "the *potential* for deficiency judgments demonstrate[s] that the purpose of foreclosure is to obtain payment on the underlying home loan." *Id.* at 461 (emphasis added). But as the court of appeals recognized, that reasoning does not apply here, because recovery of a deficiency is not an available remedy in non-judicial foreclosure proceedings under Colorado law. See Pet. App. 8a-9a. There is thus no direct conflict as to the application of the FDCPA to the non-judicial foreclosure scheme at issue here.

3. Petitioner also asserts a "direct[] conflict[]" with the decisions of two state courts of last resort. See Pet. 17-19. That assertion similarly lacks merit.

a. The Alaska Supreme Court's decision in *Alaska Trustee, LLC* v. *Ambridge*, 372 P.3d 207 (2016), addressed a non-judicial foreclosure by an entirely different entity: a private trustee empowered by Alaska law to conduct a foreclosure sale and collect the proceeds. See *id.* at 210, 218; Alaska Stat. § 34.20.070. *Ambridge* thus differs in a critical respect from this case; here, the defendant was a law firm representing a creditor merely for the purpose of *initiating* Colorado's non-judicial foreclosure process, which would be conducted by an impartial public trustee. See Colo. Rev. Stat. §§ 38-38-101, 38-38-110.

What is more, the trustee in *Ambridge* actually attempted to collect money from the borrower. The Alaska Supreme Court "conclude[d] that a reasonable consumer would read the [trustee's] notice as a demand for payment," which allowed the debtor to "avoid the threatened action only by paying the debt." 372 P.3d at 218 (emphasis omitted). In this case, by contrast, it was "clear" that McCarthy "did not demand payment nor use foreclosure as a threat to elicit payment." Pet. App. 12a. *Ambridge* thus did not resolve whether initiating a non-judicial foreclosure process *itself* amounts to a request for payment from the debtor, let alone whether initiating the *Colorado* non-judicial foreclosure process does so.

b. Contrary to petitioner's claim (Pet. 17), the decision below does not create an "intra-regional conflict" with the Colorado Supreme Court's decision in *Shapiro & Meinhold* v. *Zartman*, 823 P.2d 120 (1992). In that case, the court held that a plaintiff had adequately pleaded that an entity that initiated a non-judicial foreclosure proceeding was a "debt collector" under the FDCPA. See *id.* at 123. That holding, however, resulted from the application

of a now-outmoded pleading standard: Colorado state courts then applied the "no set of facts" standard, under which a motion to dismiss would be granted "only if it appear[ed] beyond doubt that the plaintiff can prove no set of facts in support of [the asserted] claim." *Warne* v. *Hall*, 373 P.3d 588, 592 (Colo. 2016).

In *Shapiro*, the Colorado Supreme Court permitted the plaintiff to proceed on conclusory allegations that "the attorneys are 'debt collectors,'" determining that those allegations satisfied the then-governing pleading standard because they "substantially track[ed]" the language of the FDCPA's general definition of "debt collector." 823 P.2d at 123 (citing 15 U.S.C. 1692a(6)). The court then declined to "exempt" the defendants simply because they engaged in conducting foreclosures, explaining that the definition of "debt collector" encompasses those who engage in non-judicial foreclosures "if they otherwise fit the statutory definition." *Id.* at 124. The court thus did not address the specific question whether *initiating* a non-judicial foreclosure proceeding constituted debt collection for purposes of the FDCPA.

4. Petitioner further contends (Pet. 24-27) that the decision below creates a "tension" with decisions of the Fifth Circuit and that the case "arguably" would have come out the other way in the Eleventh Circuit. In fact, the decisions of those courts underscore the absence of a conflict on the facts presented here.

a. In a case involving a law firm initiating an executory-process foreclosure, the Fifth Circuit explained that "the entire FDCPA can apply to a party whose principal business is enforcing security interests" *if* that party "nevertheless fits [the FDCPA's] general definition of a debt collector." *Kaltenbach* v. *Richards*, 464 F.3d 524, 528-529 (2006). The Fifth Circuit subsequently inter-

preted that decision as implicitly recognizing that involvement in a non-judicial foreclosure "is *not per se* FDCPA debt collection." *Brown* v. *Morris*, 243 Fed. Appx. 31, 35 (2007). The Fifth Circuit's decisions thus support the court of appeals' holding in this case that merely initiating a non-judicial foreclosure without seeking a payment of money does not render an entity a "debt collector" for purposes of the FDCPA. See Pet. App. 12a.

b. As for the Eleventh Circuit: in *Reese* v. *Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211 (2012), the defendant law firm had sent the debtor documents that both provided notice of a non-judicial foreclosure proceeding and expressly "demand[ed] full and immediate payment of all amounts due," threatening that failure to pay would result in additional liability for attorney's fees. *Id.* at 1217 (emphasis omitted). The Eleventh Circuit concluded that the letter had a "dual purpose[]": to give "notice of the foreclosure" *and* to "demand payment on the underlying debt." *Ibid.* Accordingly, the court deemed the law firm a "debt collector" under the FDCPA. *Id.* at 1217-1219. Consistent with that reasoning, the Eleventh Circuit subsequently recognized that an entity is not a debt collector where, as here, it merely engages in foreclosure activities without *also* seeking to induce the debtor to make a payment. See *Saint Vil* v. *Perimeter Mortgage Funding Corp.*, 630 Fed. Appx. 928, 931 (2015).

5. Petitioner acknowledges (Pet. 19-24) that the decision below is consistent with the Ninth Circuit's decision in *Ho*, *supra*. There, the Ninth Circuit held that a trustee that sent a borrower multiple notices initiating non-judicial foreclosure proceedings pursuant to California's non-judicial foreclosure scheme, but that did not seek the payment of money from the debtor, did not qualify as a "debt collector" as defined by the FDCPA. 858 F.3d at 570-572. Like the court of appeals in this case, the Ninth Circuit

observed that, under the relevant state law, "[t]he object of a non-judicial foreclosure is to retake and resell the security, not to collect money from the borrower." *Id.* at 571. It further explained that "debt collection" is not "coextensive" with "the enforcement of [a] security interest[]" under the FDCPA. *Id.* at 573. And it emphasized that its holding meant only that "the enforcement of security interests is not *always* debt collection"; an entity that enforces security interests could be a "debt collector" under the FDCPA if it also "engage[s] in activities that constitute debt collection." *Ibid.* (emphasis added).

As noted above, this Court recently denied a petition for a writ of certiorari in *Ho* that presented materially the same question and alleged the same conflict. See 138 S. Ct. 504 (2017). The same outcome is warranted here.

B. The Petition Does Not Present An Important Question Warranting The Court's Review In This Case

Petitioner contends (Pet. 28-32) that the question presented is exceptionally important and that this case is an optimal vehicle in which to resolve it. Petitioner is wrong on both scores. This case is a poor vehicle, and it lacks sufficient importance to warrant the Court's attention.

1. Petitioner asserts (Pet. 30) that this case is an "ideal" vehicle because it does not present the same vehicle issues as *Ho*. But this case is flawed on its own terms. If anything, the complaint in this case contains even sparser allegations than the complaint in *Ho*—particularly with regard to McCarthy, the sole potentially remaining defendant. While the challenged communications in *Ho* suggested (consistent with the governing state law) that the debtor could bring her account into good standing by making all the past due payments, see *Ho*, 858 F.3d at 570-571, the notice at issue in this case in no way urged petitioner to pay the debt, see Pet. App. 12a.

The court of appeals found that petitioner sufficiently pleaded only "that McCarthy failed to verify [petitioner's] debt after it was disputed, in violation of § 1692g." Pet. App. 5a. But petitioner himself produced a verification notice that McCarthy sent in 2015, leaving (at most) an argument that the notice came too late. See C.A. Supp. Reply Br., Ex. 3. Resolving whether the FDCPA applies here would thus be a largely hypothetical exercise. Recognizing that problem, the court of appeals characterized petitioner's allegations as "far from perfect," but looked past the "deficiencies" in order to "provide clarity" on the legal issue for the benefit of district courts in the circuit. Pet. App. 5a, 6a. If the Court were inclined to consider the applicability of the FDCPA in the context of non-judicial foreclosure proceedings, therefore, it should at a minimum do so in a case with clearer and more substantial factual allegations.

2. Petitioner contends that the decision below has a wide-ranging impact that "is difficult to overstate." Pet. 2. That is a singularly odd thing to say about a decision that is dependent on the law of a single State and is on its face circumscribed "to the facts of th[is] case." Pet. App. 12a. What is more, the court of appeals expressly noted that the outcome might be different in a case involving a judicial foreclosure (or "more aggressive collection efforts" in a non-judicial foreclosure), and it held only that initiating a non-judicial foreclosure without seeking a payment of money does not render an entity a "debt collector" under the FDCPA. See *ibid.* By its terms, therefore, the decision below reaches only a sliver of foreclosure-related activities under the legal regime of a particular State.

Debtors facing non-judicial foreclosure, moreover, are protected by a panoply of other provisions under Colorado and federal law. Colorado extensively regulates non-judicial foreclosures through a complex statutory scheme that

ensures a debtor receives notice throughout the process. See p. 4, *supra*. Foremost among those protections is Colorado's unique pre-foreclosure procedure, in which a private party seeking to foreclose must first obtain an order from a state court authorizing the sale. See Colo. R. Civ. P. 120; Colo. Rev. Stat. § 38-38-105. That procedure—which allows a debtor to contest the loan default, Pet. App. 12a—gives a debtor clear notice of the prospect of a non-judicial foreclosure and an opportunity to object to the sale. See Colo. R. Civ. P. 120(a)-(c). Indeed, as the court of appeals recognized, applying the FDCPA here could serve to undermine some of the protections afforded by state law. See Pet. App. 10a-12a.

Federal law also offers extensive protections for debtors facing foreclosure, as this case illustrates. The Consumer Financial Protection Bureau has issued lengthy regulations relating to mortgage servicing that, among other things, prohibit a loan servicer from foreclosing on a property in various circumstances. See 12 C.F.R. 1024. 30-1024.41. In this very case, petitioner indicates that he sought relief from the Consumer Protection Financial Protection Bureau on the basis of the same factual allegations asserted here. See Pet. App. 16a.

3. Finally, the Court will have ample opportunity to address the question presented if a conflict develops in the application of the FDCPA to a particular fact pattern in the context of non-judicial foreclosure proceedings. As noted above, just five months ago, this Court denied a petition for a writ of certiorari filed by the same counsel, presenting materially the same question. See 138 S. Ct. 504 (2017). And another petition filed by the same counsel and presenting the same question is pending before the Court. See *Greer* v. *Green Tree Servicing LLC*, No. 17-1351 (filed Mar. 26, 2018). Should a valid conflict arise, there will be

ample opportunities to address it (perhaps even in a petition filed by the same counsel). But it would be premature for the Court to grant review in the absence of such a conflict, especially in a case with such thin factual allegations.

* * * * *

In sum, petitioner has not identified a square conflict on the question presented, nor has he established that the court of appeals' narrow holding is of sufficient importance to warrant further review by this Court. The petition for certiorari should therefore be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2018

No. 17-1307

In the Supreme Court of the United States

DENNIS OBDUSKEY, PETITIONER

v.

MCCARTHY & HOLTHUS LLP, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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This case presents an important and recurring question that has openly divided the circuits. The case for review is exceptionally clear: Respondents do not dispute that the question has generated over a hundred conflicting decisions. They do not contest that it has wasted substantial judicial and party time and resources, and they effectively concede that courts read the FDCPA's key definition (in this critical foreclosure setting) in opposite ways. Respondents never explain how further percolation would sharpen the issues or produce any practical or theoretical benefit. And it takes only a quick glance at the exhaustive analyses on each side of the split to understand the issue arrives fully ventilated from every conceivable angle.

Respondents are thus left grasping for marginal distinctions to explain away the acknowledged conflict. Yet none of respondents' distinctions are mentioned in any of the cases. They do not appear on the face of the opinion below. No one (until now) thinks those distinctions matter, which is why so many courts have recognized a square conflict over this issue—and, indeed, it is not possible to read the actual cases and conclude there is no split.

The Court denied review in *Ho*, which, unlike here, rested on *independent* grounds and otherwise faced multiple vehicle concerns. This case, by contrast, is clean: the panel below vetted the complaint, held it stated a claim, and decided the key issue as the sole basis for decision. And these facts represent the quintessential pattern dividing the circuits, as the respondent in *Ho* (represented by the same counsel here) readily admitted.

In the end, the best case for a grant comes from—*respondents themselves*. When not trying to avoid review, respondents are more candid: "Given the split among the circuits, the issue of the applicability of the FDCPA to nonjudicial foreclosures may be ripe for consideration by

the U.S. Supreme Court." Holly Shilliday & Andrew Boylan, McCarthy & Holthus LLP, *Circuit Split Deepens: Tenth Circuit Opines that Colorado Nonjudicial Foreclosure Activity is Not Debt Collection under the FDCPA*, USFN (Feb. 13, 2018) <tinyurl.com/concedingcertworthiness>.

This case easily checks off every box for review, and respondents' strained attempt to muddy the waters falls short. The petition should be granted.

A. There Is A Clear And Intractable Conflict

1. Contrary to respondents' contention (Opp. 10-20), the circuit conflict is square and entrenched: "Whether the FDCPA applies to non-judicial foreclosure proceedings has divided the circuits." Pet. App. 5a; *Ho* v. *ReconTrust Co., NA*, 858 F.3d 568, 576 & n.11 (9th Cir. 2016) (acknowledging its "sister circuits" have "divide[d]").

This is not mere "disagreement in reasoning." Contra Opp. 10. Multiple circuits hold that "*any* type of mortgage foreclosure action, even one not seeking a money judgment on the unpaid debt, is debt collection under the Act." *Glazer* v. *Chase Home Fin. LLC*, 704 F.3d 453, 462 (6th Cir. 2013); *Wilson* v. *Draper & Goldberg, P.L.L.C.*, 443 F.3d 373, 376 (4th Cir. 2006); *Alaska Trustee, LLC* v. *Ambridge*, 372 P.3d 207, 216-217 (Alaska 2016).

The Ninth and Tenth Circuits hold the opposite. *Ho* repudiated other circuits' reasoning, and "affirm[ed]" the "leading case of *Hulse*," which it admitted "circuits ha[d] declined to follow." 858 F.3d at 572-573 (recognizing its "path[]" thus "diverge[d]"). The Tenth Circuit recognized the same contrary authority (Pet. App. 6a), but "endorse[d]" *Ho*. Under any fair reading, the circuits are intractably divided. *E.g.*, *Williams* v. *Rushmore Loan Mgmt. Servs., LLC*, No. 15-cv-673, 2018 WL 1582515, at *7-*8 & n.14 (D. Conn. Mar. 31, 2018) (confirming the conflict).

Respondents do not dispute the "confusion" this question generates (*Glazer*, 704 F.3d at 460; *Ambridge*, 372 P.3d at 212), or deny that lower courts, astoundingly, have issued over a hundred conflicting decisions on this important question (Pet. 2, 28). Instead, respondents argue that the courts' "reasoning" "differs in some respects" without producing "deep" disagreement. Opp. 10, 13. But as established (Pet. 11-28), these courts have refuted every facet of the Ninth and Tenth Circuit's analysis, which, in turn, canvassed the competing decisions but "disagree[d]" (Pet. App. 5a-12a). While respondents have an understandable incentive to paper over the split, the contrast could not be starker. This untenable conflict will continue to confound lower courts until this Court intervenes.

2. Respondents say this obvious split is irrelevant because "all but one" of the conflicting cases "involved *judicial* (or quasi-judicial) foreclosures." Opp. 11. This is baseless. Courts distinguish *true* "judicial foreclosures" because *that distinct process produces deficiency judgments. Ibid.* But the precise fact-pattern in every case in the split, including this one, involves entities pursuing foreclosure *without seeking a deficiency judgment*. That is the subject of the open conflict, and it reflects how those courts themselves understand the issue. Pet. 11-24. The entire debate is whether a foreclosure is the mere enforcement of a security interest *or* instead an attempt ("directly or indirectly") to collect debt (15 U.S.C. 1692a(6)).

And courts have taken clear sides of that debate. According to the Third, Fourth, and Sixth Circuits (and Alaska and Colorado Supreme Courts), "*any* type of mortgage foreclosure action, *even one not seeking a money judgment on the unpaid debt*, is debt collection under the Act." *Glazer*, 704 F.3d at 462 (second emphasis

added). As these courts explain, "*every* mortgage foreclosure, judicial or otherwise, is undertaken for the very purpose of obtaining payment on the underlying debt, either by persuasion (*i.e.*, forcing a settlement) or compulsion (*i.e.*, obtaining a judgment of foreclosure, selling the home at auction, and applying the proceeds from the sale to pay down the outstanding debt)." *Id.* at 461.

In so holding, those courts expressly repudiate the very position asserted by respondents' side of the split: that "mortgage foreclosure is not debt collection" unless "a money judgment is sought against the debtor in connection with the foreclosure." 704 F.3d at 460. These courts disagree that "'[p]ayment of funds is not the object of the foreclosure action'" and lenders are merely "'foreclosing [their] interest in the property.'" *Wilson*, 443 F.3d at 376. Contra Pet. App. 7a-9a, 12a (adopting the opposite position); *Ho*, 858 F.3d at 573 ("We view all of ReconTrust's activities as falling under the umbrella of 'enforcement of a security interest.'"); Opp. 12.

It blinks reality to suggest these courts would have come out differently had a different label ("quasi-judicial" or otherwise) been slapped on identical facts. The entire analysis is rooted in a close examination of the FDCPA's text, structure, and purpose, and the outcome turns on how those courts characterize, under federal law, the act of foreclosing *without* seeking a money judgment. If respondents' "distinction" were actually relevant, courts would actually discuss it, and at least *some* decision would explain away any "conflict" due to these differences. Instead, petitioner is unaware of *any* case—spanning over a

hundred conflicting decisions—adopting respondents' unusual position, which respondents offered unsupported. The split cannot be brushed aside so easily.[1]

3. Respondents also fail to distinguish the cases on their facts. Opp. 13-18.

a. Respondents say both Fourth Circuit cases, unlike this case, "involved demands for payment from the debtor." Opp. 15-16 (citing *Wilson*, *supra*, and *McCray* v. *Federal Home Loan Mortgage Corporation*, 839 F.3d 354 (4th Cir. 2016)). This is meritless. The Fourth Circuit has already rejected exactly this argument respecting *Wilson*: "[Defendant] seeks to distinguish *Wilson* on the ground that the debt collector in that case made specific demands for payment before initiating the foreclosure proceedings. *We do not read* Wilson *to ground its holding on the existence of those demands.*" *Rawlinson* v. *Law Office of William M. Rudow, LLC*, 460 F. App'x 254, 256 & n.3 (4th Cir. 2012).

And *McCray* itself confirmed that defendants acted as "debt collectors" for foreclosure activities despite never "'express[ly] demand[ing]'" payment. 839 F.3d at 359. Instead, it reaffirmed *Wilson*: "we explicitly rejected the argument 'that foreclosure by a trustee under a deed of trust is not the enforcement of an obligation to pay money or a "debt."'" 839 F.3d at 360.

Nor can respondents sidestep *McCray* because the firm was "retained" "to 'collect' on the defaulted amount." Opp. 15. This omits key language: the firm was retained to "collect" "*through the process of foreclosure*." 839 F.3d

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[1] Respondents say the "critical" point is that deficiency judgments were "*available*" in other circuits, even if not pursued. Opp. 16. But the question was whether the *activity in question*—sending foreclosure notices and initiating foreclosure—constituted "debt collection," not whether *hypothetically doing something else* (like seeking *waived* deficiency judgments) so qualified.

at 360 (emphasis added). The full quote proves *petitioner's* point: the "debt collection" was anticipated *via foreclosure*, and the court declared defendants "debt collectors" for foreclosure activities despite never "'express[ly] demand[ing]'" payment. *Id.* at 359. Petitioner would have prevailed under this authority, but not below.

b. Contrary to respondents' suggestion, *Glazer* is indistinguishable. Respondents cannot account for *Glazer*'s holding (*supra*), so they call it dictum. But the Sixth Circuit thinks otherwise. *Estep* v. *Manley Deas Kochalski, LLC*, 552 F. App'x 502, 505 (6th Cir. 2014) (*Glazer* "hold[s] that mortgage foreclosure is debt collection under the FDCPA").

Rather than address *Glazer*'s language or logic, respondents instead isolate a single sentence from *Glazer*'s extended discussion: "'the *potential* for deficiency judgments demonstrate[s] that the purpose of foreclosure is to obtain payment on the underlying home loan." Opp. 16. This sentence was tucked in the middle of a paragraph in an analysis spanning *seven pages* of the Federal Reporter (704 F.3d at 459–465); read in context, it illustrates why *all* foreclosure activity aims to collect debt: "[s]uch remedies," the *next* sentence explained, "would not exist if foreclosure were not undertaken for the purpose of obtaining payment." *Id.* at 461. Respondents thus ignore the court's operative rationale, the passages specifically *rejecting* their theory, and the express declaration that all foreclosures are covered, "even [when] not seeking a money judgment on the unpaid debt." *Id.* at 460–462. Even the Ninth and Tenth Circuits disavow respondents' reading: "*Glazer* rests entirely on the premise that 'the ultimate purpose of foreclosure is the payment of money.'" *Ho*, 858 F.3d at 576; Pet. App. 8a.

c. Respondents say *Kaymark* v. *Bank of Am., N.A.*, 783 F.3d 168 (3d Cir. 2015), involved a "*judicial* foreclosure" under Pennsylvania law (Opp. 14), but ignore that "[m]ortgage foreclosure in Pennsylvania is strictly an *in rem* or '*de terris*' proceeding. Its purpose is solely to effect a judicial sale of the mortgaged property." *Nicholas* v. *Hofmann*, 158 A.3d 675, 696 (Pa. Super. Ct. 2017). *Kaymark*'s *holding* was unambiguous: "foreclosure meets the broad definition of 'debt collection' under the FDCPA." 783 F.3d at 179 (endorsing the Fourth and Sixth Circuits). That is why courts in the Third Circuit deem it "well-settled" that the FDCPA regulates foreclosure activity. *Strader* v. *U.S. Bank Nat'l Ass'n*, No. 17-cv-684, 2018 WL 741425, at *11 (W.D. Pa. Feb. 7, 2018).

d. Respondents effectively concede the conflict with *Ambridge* on the core definitional question. Yet they argue that *Ambridge* differs in a "critical respect" because it involved a trustee rather than a law firm. Opp. 17. That "critical" respect had nothing to do with the court's reasoning, and respondents offer no explanation how this is relevant. No one reading *Ambridge*'s extensive analysis (Pet. 18-19) is left with any doubt how it resolved the question presented here: "mortgage foreclosure, whether judicial or nonjudicial, is debt collection," as "foreclosing on property, selling it, and applying the proceeds to the underlying indebtedness constitute one way of collecting a debt—if not directly at least indirectly." 372 P.3d at 212-216 & nn.14-15.

e. Respondents attempt to blunt *Shapiro & Meinhold* v. *Zartman*, 823 P.2d 120 (Colo. 1992), as a product of a "now-outmoded pleading standard." Opp. 17-18. This is perplexing. *Shapiro* held that "foreclosure is a method of collecting a debt by acquiring and selling secured property to satisfy a debt," and it faulted the "trial court" for "misinterpret[ing] the definition of debt collectors in [15

U.S.C. 1692a(6)]." 823 P.2d at 124-125. That square legal disposition had nothing to do with factual pleading standards, which is why no court, anywhere, agrees with respondents. *E.g.*, Pet. App. 5a-6a (acknowledging split with *Shapiro*).

Each decision contradicts the Ninth and Tenth Circuit's holding that foreclosure is the mere enforcement of a security interest. This Court alone can resolve that split.

4. Respondents next attack the split by saying "all" conflicting cases "involve the legal regimes of other States," not Colorado. Opp. 12. But Colorado follows the same "general rule" applied in other States (Pet. App. 8a), and these courts did not "disagree" over aspects of state law; they rejected each other's reading of the FDCPA's text, structure, and purpose. This is why the Tenth Circuit ultimately "endorse[d]" *Ho* (which involved *California* law), which itself "affirm[ed]" *Hulse* (which involved *Oregon* law), 858 F.3d at 572. Colorado law entered the picture only in the court's *preemption* analysis, which is ultimately a federal question. Pet. App. 10a-12a.

These courts have not divided due to nuances of state law, but have exhaustively undertaken traditional statutory analysis: they dissect Section 1692a's text and structure; they look to the FDCPA's related provisions (like Section 1692i); they look to the FDCPA's statutory purpose; and they consider federalism concerns. These exhaustive reviews have produced different outcomes because courts emphatically disagree over these critical elements. That disagreement over this important federal issue cries out for review.

B. The Question Presented Is Important And Recurring

1. The question presented is of exceptional legal and practical importance. It dictates whether the FDCPA's

protections apply in thousands of foreclosures with potentially trillions of dollars at stake. The federal government has recognized its "importan[ce]," and the sheer number of decisions from countless jurisdictions confirms its significance. Pet. 3, 29.

Yet respondents insist the case presents only a "narrow" question. Opp. 2. There is nothing "narrow" about it. The Tenth Circuit held that "non-judicial foreclosure[s]" fall outside the FDCPA. Pet. App. 10a. That "holding" resolves the very question that has generated over a hundred conflicting decisions and an acknowledged split among multiple circuits and two state supreme courts. It strips homeowners of federal protection in the Ninth and Tenth Circuits alone. And it leaves courts and litigants to waste time debating a question this Court alone can answer. Respondents say (without citation) that the issue affects only a "tiny portion" of foreclosures (Opp. 10), but cannot explain the constant litigation the issue generates.[2]

Nor does it matter that the Tenth Circuit suggested "additional" conduct may sweep foreclosures within the FDCPA. Opp. 13. The question is whether foreclosure activities *without* additional conduct qualify as debt collection. That question has "divide[d]" the courts (Pet. App. 5a), and it alone determines whether the FDCPA reaches entities conducting foreclosures. The fact that some entities seeking foreclosure might *separately* pursue other modes of debt collection is irrelevant.

Respondents argue the holding was "fact-bound." Opp. 10. The Tenth Circuit did not understand its holding that way; fact-bound decisions do not "settle [lower-court] confusion" or wade into circuit splits. Pet. App. 3a, 5a-6a.

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[2] Respondents assembled a remarkable cast of able counsel for an insignificant question tied exclusively to the law of a single State.

The court's express "hold[ing]" was significant and unequivocal: the "mere act of enforcing a security interest through a non-judicial foreclosure proceeding does not fall under the FDCPA." Pet. App. 12a.

C. This Case Is An Optimal Vehicle

This case is the perfect vehicle for deciding this significant question. Pet. 30-32.

1. Respondents argue that this vehicle is flawed because petitioner's complaint was "'far from perfect.'" Opp. 7, 10. But the court *held* that petitioner stated a claim; it was not merely assumed arguendo or left unaddressed. It actually vetted the complaint and determined it provided a "sufficient[]" ground for relief. Pet. App. 5a. That makes this the ideal vehicle: the panel's disposition of the question presented is the sole ground supporting dismissal, and the issue is thus outcome-determinative. That is as concrete as it gets.

Respondents' quibbling with petitioner's complaint is also meritless. Respondents admit that McCarthy "failed to verify [petitioner's] debt after it was disputed." Pet. App. 5a. That is an indisputable violation of Section 1692g. Its text plainly states that debt collectors "shall cease" any further action until a debt is verified. 15 U.S.C. 1692g(b). Here, McCarthy's verification letter in August 2015 came *after* McCarthy initiated a foreclosure despite failing to first validate the debt. That is a paradigmatic violation of this provision.

Nor is this merely a technical error. In petitioner's separate bankruptcy case, the parties currently dispute the proper owner of the loan and the proper recipient of any funds. The validation process works to avoid problems where a debt collector's mistake leads to the payment of too much money to the right person or the payment of any money to the wrong person. It also ensures that debtors are fully aware of their rights and obligations

so they can make an informed decision whether to pay the debt or accede in the consequences of default.

Under respondents' (forfeited) theory, any defendant could negate liability under Section 1692g by simply providing a tardy notice after being sued. That atextual reading would eliminate this important safeguard.

2. Respondents note the denial in *Ho* and insist "there is no valid reason for a different result" here. Opp. 10, 20. But *Ho* rested on independent grounds and implicated other vehicle concerns. Petitioner explained these obvious distinctions (Pet. 30-32), and respondents have no response.

Since *Ho* was denied, the issue has already arisen in *dozens* of conflicting decisions, including the one below. Respondents argue this Court's review would be "premature" (Opp. 22-23), but fail to explain the conceivable advantage from delay. The competing views are developed and entrenched, and neither side is standing down. There is no point to further percolation. This massive waste of judicial and party time will continue until the Court intervenes.

This Court regularly grants review where an issue arises only a fraction of the time it arises here. The deep, entrenched conflict is ripe for review, and the petition should be granted.

Respectfully submitted.

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MAY 2018

No. 17-1307

In the Supreme Court of the United States

DENNIS OBDUSKEY, PETITIONER

v.

MCCARTHY & HOLTHUS LLP, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: MARCH 13, 2018
CERTIORARI GRANTED: JUNE 28, 2018

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The following opinions, decisions, judgments, and orders have been omitted in printing the joint appendix because they already appear on the following pages in the appendix to the petition for a writ of certiorari:

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 16-1330

DENNIS OBDUSKEY, Plaintiff-Appellant

v.

WELLS FARGO; WELLS FARGO BANK; WELLS FARGO & CO; WELLS FARGO BANK NA; WELLS FARGO HOME MORTGAGE; MCCARTHY AND HOLTHUS LLP,
Defendants-Appellees

DOCKET ENTRIES

DATE	PROCEEDINGS
08/17/2016	[10397477] Civil case docketed. Preliminary record filed. DATE RECEIVED: 08/17/2016 Docketing statement due 08/31/2016 for Dennis Obduskey. Transcript order form due 08/31/2016 for Steven L. Hill. Notice of appearance due on 08/31/2016 for McCarthy and Holthus LLP, Dennis Obduskey and Wells Fargo Bank NA. [16-1330] [Entered: 08/17/2016 02:04 PM]
	* * * * *
09/01/2016	[10401709] Filed notice record is complete. Served on 09/01/2016.

DATE	PROCEEDINGS
	Appellant's brief and appendix are due on 10/11/2016 for Dennis Obduskey. [16-1330] [Entered: 09/01/2016 09:49 AM]
	* * * * *
12/08/2016	[10427978] Appellant/Petitioner's brief filed by Dennis Obduskey. 7 paper copies to be provided to the court. Served on 12/08/2016 by email. Oral argument requested? No. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [16-1330] SLH [Entered: 12/08/2016 04:43 PM]
12/08/2016	[10427984] Appellant's appendix filed by Dennis Obduskey. Total number of volumes filed: 1. Served on 12/08/2016. Manner of Service: email. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. –[Edited 12/20/2016 by SDS to attach errata to entry] [16-1330] SLH [Entered: 12/08/2016 04:50 PM]
12/12/2016	[10428446] Notice of appellant's deficient brief and appendix received from Dennis Obduskey. Type of deficiencies for brief: The hard copy of

DATE	PROCEEDINGS
	the brief is missing the required attachments, and the many attachments that are in the electronic copy. Type of deficiencies for appendix: No certificate of service or digital submission for the appendix. See attached letter for specifics. Appellant's brief and appendix due on 12/22/2016 for Dennis Obduskey. [16-1330] [Entered: 12/12/2016 12:25 PM]
12/16/2016	[10430021] Errata sheet filed by Mr. Steven L. Hill for Dennis Obduskey. Original and 7 copies. Served on 12/16/2016. Manner of Service: email. [16-1330] SLH [Entered: 12/16/2016 11:32 AM]
12/16/2016	[10430023] Errata sheet to appendix filed by Mr. Steven L. Hill for Dennis Obduskey. Original and 0 copies. Served on 12/16/2016. Manner of Service: email. –[Edited 12/20/2016 by SDS to modify text] [16-1330] SLH [Entered: 12/16/2016 11:35 AM]
	* * * * *
01/19/2017	[10437755] Appellee/Respondent's brief filed by Wells Fargo, Wells Fargo & Co., Wells Fargo Bank, Wells Fargo Bank, N.A. and Wells

DATE	PROCEEDINGS
	Fargo Home Mortgage. 7 paper copies to be provided to the court. Served on: 01/19/2017. Manner of service: email. Oral argument requested? No. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes.–[Edited 01/24/2017 by DD to add Errata Sheet] [16-1330] JEY [Entered: 01/19/2017 05:49 PM]
01/19/2017	[10437756] Supplemental appendix filed by Wells Fargo, Wells Fargo & Co., Wells Fargo Bank, Wells Fargo Bank, N.A. and Wells Fargo Home Mortgage. Total number of volumes filed: 1. Served on 01/19/2017. Manner of Service: email. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [16-1330] JEY [Entered: 01/19/2017 05:53 PM]
	* * * * *
01/23/2017	[10438127] Notice of appellees' deficient brief received from Wells Fargo, Wells Fargo & Co., Wells Fargo Bank, Wells Fargo Bank, N.A. and Wells Fargo Home Mortgage. Type of deficiency: No statement as to related or prior cases, no

DATE	PROCEEDINGS
	certificate as to Rule 31.3. See attached letter for specifics. Appellees' brief now due 02/02/2017 for Wells Fargo, Wells Fargo Bank, Wells Fargo & Co., Wells Fargo Bank, N.A. and Wells Fargo Home Mortgage [16-1330] [Entered: 01/23/2017 07:04 AM]
01/23/2017	[10438557] Errata sheet filed by Ms. Jessica E. Yates, Esq. for Wells Fargo Bank, N.A., Wells Fargo, Wells Fargo Bank, Wells Fargo Home Mortgage and Wells Fargo & Co.. Original and Served on 01/23/2017. Manner of Service: email. [16-1330] JEY [Entered: 01/23/2017 05:11 PM]
02/03/2017	[10441936] Appellee/Respondent's brief filed by McCarthy & Holthus, LLP. 7 paper copies to be provided to the court. Served on: 02/03/2017. Manner of service: email. Oral argument requested? No. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [16-1330] HRS [Entered: 02/03/2017 05:27 PM]
	* * * * *
02/09/2017	[10443212] Joinder of ANSWER BRIEF OF APPELLEE

DATE	PROCEEDINGS
	MCCARTHY & HOLTHUS, LLP filed by Wells Fargo, Wells Fargo & Co., Wells Fargo Bank, Wells Fargo Bank, N.A. and Wells Fargo Home Mortgage. Served on 02/09/2017. Manner of Service: email. [16-1330] JEY [Entered: 02/09/2017 02:07 PM]
	* * * * *
03/07/2017	[10449537] Appellant/Petitioner's reply brief filed by Dennis Obduskey. 7 paper copies to be provided to the court. Served on 03/07/2017. Manner of Service: email. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [16-1330] SLH [Entered: 03/07/2017 05:10 PM]
07/10/2017	[10481293] Order filed by Clerk of the Court - After reviewing the briefs filed in this appeal, the court has determined that supplemental briefs should be filed and oral argument is warranted. In the supplemental briefs, the parties should address whether the Fair Debt Collections Practices Act, 15 U.S.C. § 1692, applies to non-judicial foreclosure activities. Appellant's supplemental brief is due on 07/24/2017 for

DATE	PROCEEDINGS
	Appellant Dennis Obduskey. The appellees' supplemental response brief(s) shall be served and filed within 14 days after the appellant's supplemental brief. Appellant may file an optional supplemental reply brief. That brief is due within 7 days after the supplemental response(s) are filed. Oral argument will be scheduled at a later date. See attached order for further details. Served on 07/10/2017. [16-1330] [Entered: 07/10/2017 01:46 PM]
07/24/2017	[10484898] Appellant/Petitioner's supplemental brief filed by Dennis Obduskey. 7 (Counseled) paper copies to be provided to the court. Served on 07/24/2017 by email. Oral argument requested? No. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [16-1330] [Edited to reflect proper relief– Edited 07/26/2017 by NA] SLH [Entered: 07/24/2017 05:02 PM]
	* * * * *
08/07/2017	[10488346] Appellee/Respondent's supplemental brief filed by Wells Fargo, Wells Fargo & Co., Wells Fargo Bank, Wells Fargo Bank,

DATE	PROCEEDINGS
	N.A. and Wells Fargo Home Mortgage. 7 (Counseled) paper copies to be provided to the court. Served on 08/07/2017. Manner of Service: email. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [16-1330] JEY [Entered: 08/07/2017 02:32 PM]
	* * * * *
08/14/2017	[10490189] Appellant/Petitioner's supplemental reply brief filed by Dennis Obduskey. 7 (Counseled) paper copies to be provided to the court. Served on 08/14/2017. Manner of Service: email. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. –[Edited 08/17/2017 by SDS to modify docket text] [16-1330] SLH [Entered: 08/14/2017 04:17 PM]
	* * * * *
11/14/2017	[10513586] Case argued by Steven Hill for the Appellant; Jessica Yates and Holly Shilliday for the Apellees; and submitted to Judges Kelly, Murphy and Moritz. [16-1330] [Entered: 11/14/2017 02:35 PM]

DATE	PROCEEDINGS
12/06/2017	[10519435] Supplemental authority filed by Wells Fargo Bank, N.A., Wells Fargo, Wells Fargo & Co., Wells Fargo Bank and Wells Fargo Home Mortgage. Served on 12/06/2017. Manner of Service: email. [16-1330] JEY [Entered: 12/06/2017 04:09 PM]
12/06/2017	[10519465] Supplemental authority filed by Wells Fargo, Wells Fargo & Co., Wells Fargo Bank, Wells Fargo Bank, N.A. and Wells Fargo Home Mortgage. Served on 12/06/2017. Manner of Service: email. [16-1330] JEY [Entered: 12/06/2017 05:34 PM]
12/14/2017	[10521153] Response filed by Dennis Obduskey to Response to Supplemental Authority Filed By Wells Fargo Bank, NA. Served on 12/14/2017. Manner of Service: email. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [16-1330] SLH [Entered: 12/14/2017 08:48 AM]
01/19/2018	[10529611] Affirmed; Terminated on the merits after oral hearing; Written, signed, published; Judges

DATE	PROCEEDINGS
	Moritz, Kelly (author), and Murphy. Mandate to issue. [16-1330] [Entered: 01/19/2018 10:30 AM]
01/19/2018	[10529615] Judgment for opinion filed. [16-1330] [Entered: 01/19/2018 10:34 AM]
02/12/2018	[10535110] Mandate issued. [16-1330] [Entered: 02/12/2018 07:13 AM]

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLORADO
(DENVER)

No. 1:15-cv-01734-RBJ

DENNIS OBDUSKEY, Plaintiff

v.

WELLS FARGO, et al.,
Defendants

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
08/12/2015	1	COMPLAINT against All Defendants (Filing fee $ 400,Receipt Number 1082-4548389)Attorney Steven Louis Hill, Jr added to party Dennis Obduskey(pty:pla), filed by Dennis Obduskey. (Attachments: #1 Civil Cover Sheet, #2 Summons, #3 Exhibit 1, #4 Exhibit 2, #5 Exhibit 3, #6 Exhibit 4, #7 Exhibit 5, #8 Exhibit 6, #9 Exhibit 7, #10 Exhibit 8, #11 Exhibit 9, #12 Exhibit 10, #13 Exhibit 11, #14 Exhibit 12, #15 Exhibit 13, #16 Exhibit 14, #17 Exhibit 15, #18 Exhibit 16, #19 Exhibit 17, #20 Ex-

DATE	NO.	PROCEEDINGS
		hibit 18, #21 Exhibit 19, #22 Exhibit 20, #23 Exhibit 21, #24 Exhibit 22, #25 Exhibit 23, #26 Exhibit 24, #27 Exhibit 25, #28 Exhibit 26, #29 Exhibit 27)(Hill, Steven) (Entered: 08/12/2015)
		* * * * *
09/29/2015	14	MOTION to Dismiss by Defendant Wells Fargo Bank NA. (Diedrich, Christopher) (Entered: 09/29/2015)
		* * * * *
11/02/2015	18	MOTION to Dismiss *Complaint* by Defendant McCarthy and Holthus LLP. (Shilliday, Holly) (Entered: 11/02/2015)
		* * * * *
12/01/2015	31	RESPONSE to 18 MOTION to Dismiss *Complaint* filed by Plaintiff Dennis Obduskey. (Attachments: #1 Exhibit, #2 Exhibit, #3 Exhibit, #4 Exhibit, #5 Exhibit, #6 Exhibit, #7 Exhibit, #8 Exhibit, #9 Exhibit, #10 Exhibit, #11 Exhibit, #12 Exhibit, #13 Exhibit, #14 Exhibit, #15 Exhibit, #16 Exhibit)(Hill, Steven) (Entered: 12/01/2015)
		* * * * *

DATE	NO.	PROCEEDINGS
12/16/2015	35	Response to 14 MOTION to Dismiss filed by Plaintiff Dennis Obduskey. (Attachments: #1 Exhibit Exhibit 1, #2 Exhibit Exhibit 2, #3 Exhibit Exhibit 3, #4 Exhibit Exhibit 4, #5 Exhibit Exhibit 5, #6 Exhibit Exhibit 6, #7 Exhibit Exhibit 7, #8 Exhibit Exhibit 8, #9 Exhibit Exhibit 9, #10 Exhibit Exhibit 10, #11 Exhibit Exhibit 11, #12 Exhibit Exhibit 12, #13 Exhibit Exhibit 13, #14 Exhibit Exhibit 14, #15 Exhibit Exhibit 15, #16 Exhibit Exhibit 16, #17 Exhibit Exhibit 17, #18 Exhibit Exhibit 18, #19 Exhibit Exhibit 19, #20 Exhibit Exhibit 20, #21 Exhibit Exhibit 21, #22 Exhibit Exhibit 22, #23 Exhibit Exhibit 23, #24 Exhibit Exhibit 24, #25 Exhibit Exhibit 25, #26 Exhibit Exhibit 26, #27 Exhibit Exhibit 27, #28 Exhibit Exhibit 28, #29 Exhibit Exhibit 29, #30 Exhibit Exhibit 30, #31 Exhibit Exhibit 31, #32 Exhibit Exhibit 32, #33 Exhibit Exhibit 33)(Hill, Steven) Modified on 12/16/2015 to correct event text (athom,). (Entered: 12/16/2015)

DATE	NO.	PROCEEDINGS
12/22/2015	36	REPLY to Response to 18 MOTION to Dismiss *Complaint* filed by Defendant McCarthy and Holthus LLP. (Shilliday, Holly) (Entered: 12/22/2015)
01/04/2016	37	REPLY to Response to 14 MOTION to Dismiss filed by Defendant Wells Fargo Bank NA. (Diedrich, Christopher) (Entered: 01/04/2016)
		* * * * *
07/11/2016	39	MOTION for Temporary Restraining Order *and Preliminary Injunction* by Plaintiff Dennis Obduskey. (Attachments: #1 Exhibit Exhibit 1, #2 Exhibit Exhibit 2, #3 Exhibit Exhibit 3, #4 Exhibit Exhibit 4, #5 Proposed Order (PDF Only) Proposed Order)(Hill, Steven) (Entered: 07/11/2016)
07/15/2016	40	RESPONSE to 39 MOTION for Temporary Restraining Order *and Preliminary Injunction* filed by Defendant Wells Fargo Bank NA. (Attachments: #1 Declaration of Christopher J.L. Diedrich, #2 Exhibit A)(Diedrich, Christopher) (Entered: 07/15/2016)

DATE	NO.	PROCEEDINGS
07/19/2016	41	ORDER denying 39 Motion for TRO; granting 14 Motion to Dismiss; granting 18 Motion to Dismiss. Plaintiff's claims are dismissed with prejudice. by Judge R. Brooke Jackson on 7/19/16.(jdyne,) (Entered: 07/19/2016)
07/19/2016	42	JUDGMENT in favor of the defendants, McCarthy and Holthus LLP and Wells Fargo and against the plaintiff, Dennis Obduskey. by Clerk on 7/19/16. (jdyne,) (Entered: 07/19/2016)
08/17/2016	43	NOTICE OF APPEAL as to 41 Order on Motion for TRO, Order on Motion to Dismiss, 42 Judgment by Plaintiff Dennis Obduskey (Filing fee $ 505, Receipt Number 1082-5114146) (Attachments: #1 Exhibit Exhibit 1, #2 Exhibit Exhibit 2)(Hill, Steven) (Entered: 08/17/2016)

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:15-CV-1734

DENNIS OBDUSKEY, an individual

Plaintiff,

v.

WELLS FARGO, WELLS FARGO BANK, WELLS FARGO & CO., WELLS FARGO BANK NA, WELLS FARGO HOME MORTGAGE, and MCCARTHY AND HOLTHUS LLP

Defendants.

Filed: August 12, 2015

COMPLAINT

COMES NOW, Dennis Obduskey, ("Plaintiff"), by and through his attorney Steven L. Hill of Riggs, Abney, Neal, Turpen, Orbison & Lewis, P.C. makes claims against Wells Fargo, Wells Fargo Bank, Wells Fargo & Co., Wells Fargo Bank NA and Wells Fargo Home Mortgage, and McCarthy and Holthus LLP ("Defendants") and alleges as follows:

PRELIMINARY STATEMENT

This action is instituted in accordance with and to remedy Defendants' violations of the Federal Fair Debt Collections Practices Act, 15 U.S.C. Sections 1692 et seq. (hereinafter "FDCPA"), as well as its violations of related State law obligations brought as pendent claims hereto. Plaintiff brings this action to recover damages and to enjoin Defendants' unlawful conduct personally, as it affects all other consumers residing within the State of Colorado.

FACTUAL ALLEGATIONS

1. Mr. Dennis Obduskey has been dealing with Wells Fargo regarding discrepancies with his home loan since 2009 after he accepted an unsolicited loan modification offer in 2008 (Exhibit 1).

2. Wells claims to have received properly signed and timely returned modification documents in 2009, however, they later claimed those returned agreement documents were sent in error and a new, revised offer was sent. No new documents were ever received by Plaintiff and over the course of several months in 2009, Plaintiff worked with different representatives to resolve the problem. Plaintiff was eventually advised he would now have to apply for a new loan modification under a new federal program called HAMP, the Home Affordable Modification Program (Exhibit 2) (Exhibit 3) (Exhibit 4). Plaintiff was never informed of the details re-

lated to lack of receiving new modification documents until a letter from Wells dated December 9, 2011 (Exhibit 5).

3. Plaintiff advised the Federal Trade Commission of ongoing problems with Wells and its legal counsel when the FTC sought consumer feedback related to mortgage servicing issues during a public comment phase. Plaintiff submitted public comments to the FTC on July 30, 2009 under the title: Advance Notice of Proposed Rulemaking and Request for Public Comments, 16 CFR Parts 317 and 318: Mortgage Acts and Practices Rulemaking (Exhibit 6).

4. The case herein and the documentation enclosed relates in part to a complaint filed in 2012 via the Office of RESPA and Interstate Land Sales which was forwarded to the Federal Office of Comptroller of the Currency (OCC), which forwarded it to the Independent Foreclosure Review (IFR) where it basically was laid down in January 2013 as part of consent agreement ordered with federal banking regulators, the OCC, the Office of Thrift Supervision and the Board of Governors of the Federal Reserve System and several major banks and mortgage servicers, including Wells Fargo. That settlement, however, did not prohibit any additional legal actions and Wells Fargo was one of those who federal regulators sought to require improved customer assistance behavior in wide-

ranging foreclosure abuses and improve customer service standards. The company signed on to the agreement with the OCC.

5. Between 2008-2012, Defendant Wells offered Plaintiff multiple loan modifications, solicited and received 12 "trial payments" across three different offers, then later denied the modifications and applied the "trial payments" as late payments on the account and for other unspecified fees. Wells Fargo sent documents with opposing messages within days of each other (Exhibit 7) (Exhibit 8).

6. The complaint is being drafted to highlight the unchanged behavior of Wells Fargo since 2008 and note that in June, 2015, as the result of unchanged behavior, the OCC placed new sanctions on Wells Fargo & Co. for failure to make significant gains in these areas (Exhibit 9).

7. The original complaint in this FDCPA case related to Wells Fargo and their current agents/law firm representatives' failure to reply to point-by-point issues in a Qualified Written Request which was sent to them in June 2011 prior to their second of now four foreclosure efforts (Exhibit 10).

8. The company never directly responded to the QWR, which was written by HUD- approved counselor, NACA, the Neighborhood Assistance Corporation of America. Plaintiff has included a copy along with this original complaint.

9. Without citing specific items in written correspondence, Wells asserted that some items requested are considered to be proprietary information of WFHM and would not be provided without subpoena.

10. Representatives of Wells Fargo know or should have known that the Colorado Rule 120 foreclosure process does not allow for the use of subpoenas and uses this unfair debt collection/business practice for foreclosures in Colorado, depriving consumers of due process as safeguarded in the Fifth and Fourteenth Amendments to the U.S. Constitution prohibiting the arbitrary denial of life, liberty or property (Exhibit 11).

11. Several years of Defendant misinformation and re-documentation of lost paperwork are unfortunately typical, but now, however, the problems of Defendant too have moved to more nefarious issues.

12. This includes the hiring of a law firm that fails to follow the rules associated with the FDCPA.

13. After filing a complaint with the Consumer Financial Protection Bureau on June 11, 2015, related to failure of the law firm representing Wells Fargo, McCarthy & Holthus LLP, to respond to a verification request response to that complaint, Wells Fargo now claims that the company has assigned no single point of contact as required by federal guidelines and state law (C.R.S. § 38-38-103.1) and their documentation regarding true ownership provided in the

CFPB response conflicts with prior assertions of ownership records (Exhibit 12).

14. Wells has claimed numerous different owners of the note. Initially it was an unidentified "investor," which morphed to assignment to Wells Fargo via a Mortgage Electronic Registration Systems (MERS) "representative" on May 3, 2011, allegedly backdated to the date the loan was signed on May 31, 2007. But on December 9, 2011, a Wells "Executive Mortgage Specialist" claimed that Wells was the servicer of the loan and that MERS continues to hold the mortgage lien on behalf of the beneficial note holder and servicers. On June 30, 2015, Wells also provided written documentation claiming Freddie Mac has owned the note since June 18, 2007, (Exhibit 13) and has provided other iterations claiming that the note was still assigned to MERS. Freddie Mac's website says they are the holder of the mortgage as of August 4, 2015. During its initial foreclosure action in 2009, Wells claimed to own the note, though they had no assignment recorded at that time (Exhibit 14).

15. Documents provided to the CFPB from Wells Fargo in July 2015 shows undocumented charges apparently added to the account, including charges for postings of sale last year (when no foreclosure was active) (Exhibit 15).

16. On behalf of the Plaintiff this Law Firm sought (by phone) clarification of the CFPB documents supplied by Wells Fargo after receiving their CFPB response dated June 30, 2015 and spoke

to Wells Executive Mortgage Specialist Todd Good (Exhibit 16).

17. Mr. Good supplied the documents to the CFPB and assured Plaintiff's attorney that everything was properly researched and accurate.

18. Details are too extensive to try and put in a brief however, a spreadsheet related to Plaintiff's testimony at a state of Colorado Senate Judiciary Hearing in 2012, outlines the majority of Wells Fargo issues (Exhibit 17).

19. The Office of Comptroller of the Currency labeled the QWR case #02089486 and a response from the OCC Customer Assistance Group on July 10, 2012 said "our office will not be taking further action on your complaint at this time." The OCC had believed that the Independent Foreclosure Review would address questionable actions. Plaintiff has since requested that the OCC re-open its case file after providing updated documentation as supplied by Wells. On July 28, 2015, the OCC complied and has launched a new "appeal" investigation under Case #03043132.

20. Consumer Financial Protection Bureau (CFPB) Case #150610-001588 was submitted by Plaintiff on June 10, 2015. This complaint relates to the Fair Debt Collections Practices Act in which the (new, current) law firm representing Wells Fargo, McCarthy and Holthus LLP, failed to provide with any validation to Plaintiff prior to initiating a new foreclosure action in May, 2015, despite documented response to the

law firm's letter within 30 days as the law required (Exhibit 18). The CFPB split the case into a complaint against the law firm, McCarthy and Holthus, LLP and one against Wells Fargo.

21. Plaintiff received undated mail notices from McCarthy & Holthus in early August of 2014 advising Plaintiff that they are serving as debt collectors and will assume the debt to be valid pursuant to the FDCPA and Colorado Fair Debt Collection Practices Act unless Plaintiff respond within 30 days, in which case they will supply to Plaintiff certain documentation verifying the name and address of the original creditor, and other "writing or verification evidencing the debt." Defendant clearly believes it is operating under FDCPA law and would be required to withhold future action until directly providing verification information to Plaintiff (Exhibit 19).

22. Plaintiff never received any verification information and McCarthy & Holthus, which then began to pursue new collection efforts in May, 2015, (Exhibit 20) by filing a Notice of Election and Demand with the Public Trustee in Park County and initiating a foreclosure action. This is both a violation of C.R.S. § 12-14-109 and 15 U.S.C. 1692g – Validation of debts.

23. Defendant McCarthy and Holthus failing to provide an appropriate response to Plaintiff prior to taking further action is a clear FDCPA violation.

24. A written response by McCarthy Holthus lacked the basic information necessary within a validation response.

25. CFPB Case #150611-000047 was submitted June 11, 2015. The CFPB split the case into a complaint again. Defendant McCarthy and Holthus and Defendant Wells. This is the action which generated the responses from Todd Good representing Wells, raising more questions than resolving them. The CFPB is currently reviewing the dispute.

26. Despite being on notice of representation by counsel in earlier actions, Wells Fargo or contracted employees continued leaving monthly contact door hangers (Exhibit 21) upon Plaintiff's home urging him to contact his mortgage servicer and listed a phone number to call. The number directs to contact Wells Fargo. Counsel for Plaintiff was advised by a counsel for Wells Fargo, and a Wells Fargo representative, that they had no knowledge of anyone authorized to place the notice at home (Exhibit 22) (Exhibit 23). The notices have continued monthly and each notice represents a separate FDCPA violation.

27. The "Communication" is in violation of FDCPA § 805(2). Attorneys notified the previous collection agency via telephone and written correspondence that Obduskey was represented by an attorney. Each "communication" is in violation of this as §805 (2) states the "debt collector can readily ascertain." This is also in violation of C.R.S. § 12- 14-105(b).

28. Defendants refuse to abide by their own corporate policies of the law regarding debt collection and ethics. Defendants have been on notice for nearly three years that Plaintiff was represented by legal counsel yet still placed collection documentation upon Plaintiff's door and sent him collection letters.

29. FDCPA § 813 defines "Civil Liabilities" and remedies afforded to the consumer in which Plaintiff is seeking but not limited to the following under this act: a) § 813(1): any actual damage sustained by such person as a result of such failure; b) § 813(2)(a): in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000 and c) § 813(3): in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the Defendant attorney's fees reasonable in relation to the work expended and costs.

30. Plaintiff has worked in an amicable fashion with each of the three previous law firms Defendant has hired. In each case, foreclosure actions were withdrawn.

31. During the repeated contacts with Plaintiff, Defendants have conducted themselves in a manner which violated the spirit of the FDCPA and the rules of conduct imposed on it and members of its industry. In correspondence to Plaintiffs'

counsel on January 18, 2013, Wells represented that the Independent Foreclosure Review process would determine if (Plaintiff) has suffered financial injury as a result of any errors, misrepresentations or other deficiencies in the foreclosure process. (Plaintiff) will then receive a letter with the findings of the review and information about possible compensation and other remedies (Exhibit 24).

32. The Wells representative knew or should have known that on January 7, 2013, Wells and nine other mortgage servicers entered into an agreement which effectively shut down that IFR review process (Exhibit 25).

33. In September 2011, Plaintiff sought the assistance of counsel to deal with the whirlwind of wrongful actions taken place by Wells Fargo.

34. In August, 2014, Plaintiff counsel initially provided information and guidance to Plaintiff regarding the requirement to validate debts and Defendant's counsel have been sent notification of such requirements.

35. They have failed to meet the basic requirements with collections and debt validation.

36. The foregoing acts and omissions were undertaken on behalf of Defendants by its officers, agents or employees acting at all times relevant hereto within the scope of that relationship.

37. Indeed, Defendants' foregoing acts and omissions were undertaken by it indiscriminately

and persistently, as part of its regular and routine debt collection efforts, and without regard to or consideration of the identity or rights of Plaintiff or other persons who have been the objects of its collection practices.

38. As a proximate result of Defendants' acts and omissions, Plaintiff has suffered actual damages and injury, including, but not limited to, the cost of his legal defense to the collection actions, damage to his personal credit, extreme mental anguish and suffering, emotional distress, humiliation, and embarrassment, for which he should be compensated in an amount to be proven at trial.

39. The foregoing acts and omissions of Defendants were undertaken by them willfully, maliciously, intentionally, knowingly, or in gross or reckless disregard of the rights of Plaintiff.

40. As a result of the foregoing acts and omissions of Defendants, and in order to punish them for their outrageous and unlawful conduct as well as to deter them from committing similar acts in the future as part of its debt collection efforts, Plaintiff is entitled to recover punitive damages in an amount to be proven at trial.

41. Plaintiff therefore seeks to recover actual, statutory, treble, and punitive damages on behalf of himself as well as declaratory relief together with reasonable attorneys' fees and costs.

JURISDICTION

1. Jurisdiction of this Court attains pursuant to the FDCPA, 15 U.S.C. § 1692k(d), and the doctrine of pendent jurisdiction.

PARTIES

2. Plaintiff is an individual over the age of 18 who resides in Bailey, Colorado

3. Defendant Wells Fargo Bank, Wells Fargo & Co., Wells Fargo Bank NA, Wells Fargo Home Mortgage ("Wells"), 101 N. Phillips Avenue, Sioux Falls, SD 57104, United States is an American multinational banking and financial services holding company which, at all times relevant herein, was licensed to do business and was conducting business in the State of Colorado. Wells Fargo is engaged in the business of banking, mortgage lending, mortgage servicing, debt collecting and operating a debt collection agency from its principal place of business in 101 N. Phillips Avenue, Sioux Falls, SD 57104, United States, Wells Fargo has a registered agent within the state of Colorado at 1560 Broadway, Ste. 2090, Denver, CO 80202, United States and regularly collects or attempts to collect debts owed or due or asserted to be owed or due another, and is considered a "debt collector" as defined by 15 U.S.C. § 1692a(6). Defendant has also stated in writing that as a loan servicer, they are required by the FDCPA to advise they are attempting to collect a debt.

4. Defendant McCarthy and Holthus, LLP is a multi-state law firm and limited liability partnership licensed to conduct business in the State of Colorado. McCarthy and Holthus is engaged in the business of litigation, debt collecting, operating a debt collection agency from its principal place of business in Centennial, Colorado, and regularly collects or attempts to collect debts owed or due or asserted to be owed or due another, and is a "debt collector" as defined by 15 U.S.C. § 1692a(6). Defendants have stated in writing they are subject to the FDCPA in documents mailed to Plaintiff and would follow FDCPA rules and regulations.

5. At all times mentioned herein, each Defendant was the agent or employee of each of the other Defendants and was acting within the course and scope of such agency or employment. The Defendants are jointly and severally liable to Plaintiff.

CAUSES OF ACTION

COUNT I

UNFAIR DEBT COLLECTION PRACTICES

(WELLS FARGO & MCCARTHY HOLTHUS)

6. The foregoing combined acts and omissions of Defendants constitute violations of the FDCPA, including, but not limited to sections 1692(c) (communicating with third party), 1692(d) (harassment or abuse), 1692(e) (false or misleading representations), 1692(f) (unfair practices), and 1692(g) (validation of debts).

7. Furthermore there is a clear violation of the following: 15 USC 1692(g) § 809(a) and (b): (1) failure to respond to a properly delivered notice requesting debt validation, (2) ignoring valid written request related to verification of the debt and continue to collect, and (3) continue to collect on debt before providing verification

8. Plaintiff set forth in each of his letters that he sought a response to be sent to his personal address.

9. Defendant did not communicate information regarding this alleged debt to Plaintiff despite his specific request within 30 days of receiving notice, as required by state and federal law.

10. Defendant's conduct was intentionally meant to harass and abuse Plaintiff in an effort to make him pay the alleged debt.

11. Defendant's statements and actions gave the false representation of Plaintiff's legal obligation for the alleged debt.

12. Defendant's actions represent its overly aggressive policy of collecting money from debtors at all costs, to include disregarding established rules and regulations provided by the Colorado State Legislature and its administrative bodies.

13. The Fair Credit Reporting Act also provides for civil liability for violation of the Act's provisions 15 U.S.C.A. § 1681(n) and U.S.C.A. § 1681(o).

14. Plaintiff is entitled to recover statutory damages, actual damages, reasonable attorney's fees, and costs.

COUNT II

UNFAIR AND DECEPTIVE TRADE PRACTICE

(WELLS FARGO & MCCARTHY HOLTHUS)

15. Plaintiff incorporates all previous paragraph provided herein

16. The foregoing acts and omissions constitute a deceptive trade practices made unlawful pursuant to C.R.S. § 6-1-105.

17. Defendant engages in these underhanded measures in an effort to increase revenues and to obtain a competitive edge in the debt collection industry.

18. Examination of the accounting spreadsheets show the numerous fees that have been added to the original loan, but there is a complete failure regarding the explanation of such fees and actions.

19. Plaintiff is entitled to recover his actual damages, his actual damages trebled, plus reasonable attorney's fees and costs.

COUNT III

DEFAMATION

(WELLS FARGO & MCCARTHY HOLTHUS)

20. Plaintiff incorporates all previous paragraphs provided herein.

21. The foregoing acts and omissions constitute libel per quod.

22. Pursuant to the Fair Credit Reporting Act, 15 U.S.C.A. § 1681s-2(a), the furnisher of information to consumer reporting agencies has a duty to provide accurate information about a consumer's credit file.

23. Defendant Wells Fargo directed their legal counsel to file a civil action for the foreclosure of a home which became a matter of public record.

24. The foreclosure was printed in local publications within the state of Colorado

25. Defendant also caused derogatory information to be placed on Plaintiff's personal credit report. Defendant falsely reports to credit bureaus that "dispute resolved; customer disagrees," when no dispute was ever resolved.

26. Defendant did these actions deliberately and with knowledge or reckless disregard for the truth or falsity of its allegations.

27. Defendant did so to deliberately cause damage to Plaintiff's reputation.

28. Plaintiff is entitled to recover his actual damages, his actual damages trebled, plus reasonable attorney's fees and costs.

COUNT IV

EXTREME AND OUTRAGEOUS CONDUCT - EMOTIONAL DISTRESS

(WELLS FARGO & MCCARTHY HOLTHUS)

29. Plaintiff incorporates all previous paragraphs provided herein.

30. The Defendants actions have created anxiety and numerous sleepless nights for Plaintiff.

31. Plaintiff has attempted to amicable with Defendant Wells Fargo and had made gains regarding possible settlement in the past.

32. As Defendant Wells Fargo hired new law firms to initiate foreclosure actions the progress of stipulation and settlement has been lost. Plaintiff has been forced to deal with three law firms regarding the debt.

33. Furthermore Plaintiff recently discovered that the Defendant Wells Fargo has failed to provide accurate information pertaining to the current note holder of such loan.

34. Defendants engaged in the conduct recklessly or with the intent of causing Plaintiff suffer distress.

35. As a direct and proximate result of Defendants' outrageous conduct, Plaintiff suffered severe mental distress, mental suffering, or mental anguish, including fright, nervousness, grief, anxiety, worry, humiliation, and indignity.

36. As a proximate result of Defendants' conduct, Plaintiff has suffered damages in an amount to be determined according to proof.

37. Defendants acted with oppression, fraud or malice, thereby entitling Plaintiff to punitive damages in an amount according to proof.

COUNT V

COMMENCEMENT OF UNLAWFUL COLLECTIONS ACTION

(WELLS FARGO & MCCARTHY HOLTHUS)

38. In a letter dated June 5, 2009, Plaintiff was advised by Wells Fargo Home Mortgage that he was in default on loan 0205097832, that the entire balance was due and payable, and they had instructed their law firm to initiate foreclosure proceedings. This is known as an acceleration letter. (Exhibit 26)

39. Defendant and such agents filed a Notice of Election and Demand ("NED") with Park County on July 10, 2009, which also effectively accelerated the amount due. (Exhibit 27)

40. Colorado Foreclosure statutes 38-38-100 through 38-38-114 show that two distinctly separate steps are required in a simplified foreclosure: (1) filing of the NED in an administrative action putting the public on notice that a foreclosure process is taking place, and (2) a separate, required court action filed by the law firm representing the holder of evidence of debt, called a Rule 120 Hearing, to seek a court "Order Authorizing Sale."

41. Pursuant to C.R.S. § 13-80-103.5, an action to recover a liquidated or un- liquidated debt, or determinable amount of money due to the person bringing the action, shall be commenced within six years after the cause of action accrues and not thereafter.

42. As discussed in *Hassler v. Account Brokers of Larimer County, Inc.*, 274 P.3d 547, 549 (Colo. 2012), the court concluded that once an installment security agreement is validly accelerated, the entirety of the remaining balance becomes due and therefore the cause of action to collect the entire debt accrues.

43. Pursuant to the Colorado Rules of Civil Procedure, Rule 3 states that, "a civil action is commenced (1) by filing a complaint with the court, or (2) by service of a summons and complaint.

44. Defendant's filing of a new NED on May 12, 2015 with Park County does not satisfy the requirements under the C.R.C.P. to commence a civil action, as the complaint was not filed with a court.

45. Any attempts by Defendant to now file a Rule 120 action is barred by the six-year statute of limitations and as of the date herein Defendant has still not filed with the court. The cause of action to collect the debt accrued June 5, 2009, with the acceleration letter sent to Plaintiff by Wells Fargo Home Mortgage, followed by initiating a foreclosure action the following month.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for the following relief:

1. For compensatory damages;

2. For statutory damages;

3. For punitive damages;

4. For pre-judgment interest to the extent permitted by law;

5. For an award of attorneys' fees, costs and expenses incurred in bringing this action;

6. For injunctive relief, restitution, and disgorgement of ill-gotten gains; and for requirement that any pending foreclosure actions be immediately withdrawn;

7. For the investigation, filing and prosecution of this action; and

8. For such other and further relief as the Court may deem just and proper

9. That on behalf of all residents subjected to the Rule 120 Foreclosure process and the Debt Collection Process in Colorado that the Federal Court review and determine that the practices used violates due process for all effected citizens.

Respectfully submitted this 12th day of August, 2015,

/s/ Steven L. Hill
Steven L. Hill, Esq.
Riggs, Abney, Neal, Turpen, Orbison & Lewis, P.C.
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Email to all personnel:
First initial and last name@mccarthyholthus.com

Re: Property: 132 Wagon Tongue Road, Bailey, CO 80421
Loan No. Ending: 7843
M&H File No.: CO-14-631150-JS

MCCARTHY & HOLTHUS MAY BE CONSIDERED A DEBT COLLECTOR ATTEMPTING TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE. IT IS OUR UNDERSTANDING THAT YOU ARE NOT CURRENTLY IN BANKRUPTCY OR THE DEBT HAS NOT BEEN DISCHARGED. IF SO, THEN PLEASE DISREGARD THIS LETTER IN ITS ENTIRETY.

This office is instructed to commence foreclosure against the above-referenced property. Pursuant to, and in compliance with, the Fair Debt Collection Practices Act and the Colorado Fair Debt Collection Practices Act, this office provides the following notices:

FOR INFORMATION ABOUT THE COLORADO FAIR DEBT COLLECTION PRACTICES ACT, SEE WWW.AGO.STATE.CO.US/CADC/CADCMAIN.CFM.
A consumer has the right to request in writing that a debt

collector or collection agency cease further communication with the consumer. A written request to cease communication will not prohibit the debt collector or collection agency from taking any other action authorized by law to collect the debt.

As of 7/29/2014, the total amount of the debt currently owed is $468,300.20. Because of interest, late charges, and other charges that may vary from day-to-day, the amount due on the day you pay may be greater. For further information, or to request a statement of all of these amounts computed through a specified date, please contact us at the address or telephone number above. The current creditor to whom the debt/loan is owed is: WELLS FARGO BANK, N.A..

This office will assume this debt to be valid unless you dispute its validity, or any part of it, within 30 days after receiving this notice. If you notify this office in writing within the 30-day period that the debt, or any part of it, is disputed we will obtain and mail to you a copy of a writing or verification evidencing the debt. If you request from this office in writing within the 30-day period the name and address of the original creditor, we will obtain and mail to you the name and address of the original creditor. Written requests pursuant to this Notice should be directed to the address above. Even though the foreclosure process is being commenced and may proceed during the 30-day period, you still retain your rights set forth in this paragraph.

Sincerely,
McCarthy and Holthus, LLP
* * * * *

NOTICE OF ELECTION AND DEMAND FOR SALE BY PUBLIC TRUSTEE
No. 2015-0016

TO THE PUBLIC TRUSTEE OF PARK COUNTY, STATE OF COLORADO

Pursuant to the terms of the Deed of Trust described as follows:

Original Grantor(s) (Borrower)	Dennis K. Obduskey
Original Beneficiary	Mortgage Electronic Registration Systems, Inc. as nominee for First Magnus Financial Corporation, an Arizona Corporation
Current Holder of the Evidence of Debt	Wells Fargo Bank, N.A.
Date of Deed of Trust	5/31/2007
Recording Date of Deed of Trust	6/12/2007
County of Recording	PARK
Reception No. of Deed of Trust	641460

You are hereby notified that the undersigned, as current holder of the Evidence of Debt secured by the Deed of Trust described above, the original principal amount of which was $329,940.00, declares that the covenants of said Deed of Trust have been violated for reasons including, but not limited to, the failure to make timely payments required under said Deed of Trust and the Evidence of Debt secured thereby. Therefore, the current holder of the Evidence of Debt has elected to accelerate the entire

indebtedness. The outstanding principal balance (exclusive of interest and any other changes properly allowable under the document(s) evidencing said debt) due and owing upon the Evidence of Debt secured by the above-described Deed of Trust being foreclosed is $329,000.00.

The following described property is all of the property encumbered by said Deed of Trust:

LOT 108, DEER CREEK VALLEY RANCHOS-UNIT 4, COUNTY OF PARK, STATE OF COLORADO,

and is known by street and number: 132 Wagon Tongue Road Bailey, Colorado 80421

THE LIEN OF THE DEED OF TRUST BEING FORECLOSED MAY NOT BE A FIRST LIEN.

The undersigned therefore elects to advertise the property described herein for sale. Demand is hereby made that you, as Public Trustee named in said Deed of Trust, give notice, advertise for sale, and sell said property for the purpose of paying the indebtedness thereby secured and the expenses of making said sale, all as provided by law and terms of said Deed of Trust.

MCCARTHY & HOLTHUS, LLP MAY BE CONSIDERED A DEBT COLLECTOR ATTEMPING TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.

TO THE EXTENT YOUR OBLIGATION HAS BEEN DISCHARGED OR IS SUBJECT TO THE AUTOMATIC STAY IN A BANKRUPTCY

PROCEEDING, THIS NOTICE IS FOR INFORMATIONAL PURPOSES ONLY AND DOES NOT CONSTITUTE A DEMAND FOR PAYMENT OR AN ATTEMPT TO COLLECT INDEBTEDNESS AS YOUR PERSONAL OBLIGATION. IF YOU ARE REPRESENTED BY AN ATTORNEY, PLEASE PROVIDE US WITH THE ATTORNEY'S NAME, ADDRESS AND TELEPHONE NUMBER.

May 12, 2015 — Date

Wells Fargo Bank, N.A. — Current Holder of the Evidence of Debt

McCarthy & Holthus, LLP

By: */s/ Joan Olson*

Holly Shilliday, Attorney Reg. No. 24423
Joan Olson, Attorney Reg. No. 28078
Iman Tehrani, Attorney Reg. No. 44076
Jennifer Cruseturner, Attorney Reg. No. 44452
Erin Robson, Attorney Reg. No. 46557
7700 E. Arapahoe Road, Suite 230
Centennial, CO 80112
Telephone: 877-369-6122
Attorney for Current Holder of the Evidence of Debt

CO-14-631150-JS

7700 E. Arapahoe Road, Suite 230
Centennial, CO 80112

McCarthy•Holthus
A Limited Liability Partnership
7700 E. Arapahoe Road, Suite 150
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Email to all personnel:
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Via U.S. Certified and First Class Mail

Dennis K. Obduskey
132 Wagon Tongue Road
Bailey, CO 80421
Original Borrower

Re: Property Address:	132 Wagon Tongue Road, Bailey, CO 80421
Loan No. Ending:	7843
M&H File No.:	CO-14-631150-JS

Dear: Dennis K. Obduskey:

Pursuant to Colorado law, this letter is written to notify you that you may contact the Colorado Foreclosure Hotline at 1-877-601-HOPE. In addition, if you have questions regarding the residential loan referenced above, then please contact Loss Mitigation Loan Service Representatives at 1-800-416-1472.

Under Section 6-1-1107, C.R.S., it is illegal for any person acting as a foreclosure consultant to charge an up-front fee or deposit to the borrower for services related to the foreclosure.

Sincerely,

McCarthy and Holthus, LLP
(855) 809-3977
teamcojs@mccarthyholthus.com

MCCARTHY & HOLTHUS MAY BE CONSIDERED A DEBT COLLECTOR ATTEMPTING TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE. IT IS OUR UNDERSTANDING THAT YOU ARE NOT CURRENTLY IN BANKRUPTCY OR THE DEBT HAS NOT BEEN DISCHARGED. IF SO, THIS LETTER IS INTENDED FOR INFORMATIONAL PURPOSES ONLY.

FOR INFORMATION ABOUT THE COLORADO FAIR DEBT COLLECTION PRACTICES ACT, SEE WWW.AGO.STATE.CO.US/CADC/CADCMAIN.CFM.
A consumer has the right to request in writing that a debt collector or collection agency cease further communication with the consumer. A written request to cease communication will not prohibit the debt collector or collection agency from taking any other action authorized by law to collect the debt.

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PAYOFF QUOTE

7/27/2015

Dennis K. Obduskey
132 Wagon Tongue Road
Bailey, CO 80421

MCCARTHY & HOLTHUS, LLP MAY BE CONSIDERED A DEBT COLLECTOR ATTEMPTING TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THE PURPOSE. HOWEVER, IF YOU ARE IN BANKRUPTCY OR HAVE BEEN DISCHARGED IN BANKRUPTCY, THIS LETTER IS FOR INFORMATIONL PURPOSES ONLY AND IS NOT INTENDED AS AN ATTEMPT TO COLLECT A DEBT OR AS AN ACT TO COLLECT, ASSESS, OR RECOVER ALL OR ANY PORTION OF THE DEBT FROM YOU PERSONALLY

SALE SCHEDULED FOR 9/16/2015

This correspondence is sent in conjunction with the processing of a non-judicial foreclosure. Your request does not stop the foreclosure proceedings from continuing. **Accordingly, it is your responsibility to determine if a sale might be scheduled for a date earlier than the expiration date of these figures. Unless you obtain written acknowledgement that any scheduled sale will be postponed, the sale will be held as scheduled.**

Please Note: Requesting a reinstatement or payoff quote does not stop the foreclosure process. Waiting to make your payment may increase the amount necessary to cure the default. Please see dates and amounts below which will increase as the foreclosure process continues, you should submit payment as quickly as possible to avoid incurring any additional fees or costs.

Lender/Servicer Name:	WELLS FARGO BANK N.A.
Loan Number:	0205097843
Loan Type:	Conventional Residential
Attorney File#:	CO-14-631150-JS
Mortgagor(s) Name:	Dennis K. Obduskey
Property Address:	132 Wagon Tongue Road, Bailey, CO 80421

* * * * *

Payoff Letter – Page 1
M&H FILE No.: CO-14-631150-JS

McCarthy•Holthus
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Sent Via US Mail

Dennis K. Obduskey
132 Wagon Tongue Road
Bailey, CO 80421

8/4/2015

Re: **FDCPA Verification Request**
M&H File No. CO-14-631150-JS
Loan No. Ending: 7843
Loan Amount: $329,940.00
Property Address 132 Wagon Tongue Road, Bailey, CO 80421

Dear Dennis K. Obduskey:

This firm is in receipt of your verification request pursuant to the Fair Debt Collection Practices Act and/or Colorado Revised Statute 12-14-109.

The name and address of the original creditor is as follows:

Mortgage Electronic Registration Systems, Inc. as nominee for First Magnus Financial Corporation, An Arizona Corporation
603 North Wilmot Road, Tucson, AZ 85711

Enclosed as verification of the debt, please find a payoff quote, which reflects the following amount that your current creditor is requiring to payoff this loan: $498,159.07 (good-through (8/14/2015)).

Please feel free to contact our office if you require additional assistance: (855) 809-3977.

Borrower(s): Dennis K. Obduskey
Page: 2

Cordially,

/s/ Iman Tehrani

Iman Tehrani, Associate Attorney

Enclosures: Payoff Quote; Deed of Trust

MCCARTHY & HOLTHUS MAY BE CONSIDERED A DEBT COLLECTOR ATTEMPTING TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE. TO THE EXTENT YOUR OBLIGATION HAS BEEN DISCHARGED OR IS SUBJECT TO THE AUTOMATIC STAY IN A BANKRUPTCY CASE, THIS NOTICE IS FOR INFORMATIONAL PURPOSES ONLY AND DOES NOT CONSTITUTE A DEMAND FOR PAYMENT OR AN ATTEMPT TO

COLLECT A DEBT AS YOUR PERSONAL OBLIGATION.

No. 17-1307

In the Supreme Court of the United States

DENNIS OBDUSKEY, PETITIONER

v.

MCCARTHY & HOLTHUS LLP, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

This case asks whether the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. 1692-1692p, applies in the foreclosure context.

Congress passed the FDCPA to eliminate "abusive, deceptive, and unfair debt collection practices" by "debt collectors." 15 U.S.C. 1692(a), (e). The FDCPA broadly defines the term "debt collector" as "any person" in "any business the principal purpose of which is the collection of any debts," or "any person" who "regularly collects or attempts to collect, directly or indirectly, debts owed or due * * * another." 15 U.S.C. 1692a(6). Although the Act does not define "debt collection," this Court previously has: "'[t]o collect a debt' is 'to obtain payment or liquidation of it.'" *Heintz* v. *Jenkins*, 514 U.S. 291, 294 (quoting *Black's Law Dictionary* 263 (6th ed. 1990)).

In a non-judicial foreclosure, an entity sends a consumer a series of notices, declaring that the consumer has defaulted on a debt, owes money to a creditor, and faces foreclosure due to the failure to pay. In response, if the consumer fails to cure the default or pay the debt, his or her house is liquidated to pay off the debt.

The question presented is:

Whether the FDCPA applies to non-judicial foreclosure proceedings.

PARTIES TO THE PROCEEDING BELOW

Petitioner is Dennis Obduskey, the appellant below and plaintiff in the district court.

Respondents are McCarthy & Holthus LLP and Wells Fargo Bank, N.A., the appellees below and defendants in the district court.

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In the Supreme Court of the United States

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ON WRIT OF CERTIORARI
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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 879 F.3d 1216. The opinion of the district court (Pet. App. 14a-32a) is unreported but available at 2016 WL 4091174.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 2018. The petition for a writ of certiorari was filed on March 13, 2018, and granted on June 28, 2018. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. 1692-1692p, are reproduced in an appendix to this brief (App., *infra*, 1a-6a).

INTRODUCTION

Under the FDCPA, a "debt collector" is "any person" who "regularly collects or attempts to collect, directly or indirectly, debts owed or due * * * another." 15 U.S.C. 1692a(6). And "[t]o collect a debt," in turn, "is to obtain payment *or liquidation* of it." *Heintz* v. *Jenkins*, 514 U.S. 291, 294 (1995) (quoting *Black's Law Dictionary* 263 (6th ed. 1990)) (emphasis added).

In every conceivable sense, non-judicial foreclosure is a clear and obvious attempt to collect a debt. The process starts with a series of notices. These notices declare a default, state the amounts owned, identify the creditor, instruct how and where to pay, and explain the consequences of failing to cure the default. Any normal consumer would understand these statements as a direct attempt to collect a debt. And if those notices fail to induce payment, the consumer's house is sold (*i.e.*, "liquidat[ed]") for the express purpose of *satisfying the debt*.

Thus, at its irreducible core, "*every* mortgage foreclosure, judicial or otherwise, is undertaken for the very purpose of obtaining payment on the underlying debt, either by persuasion (*i.e.*, forcing a settlement) or compulsion (*i.e.*, obtaining a judgment of foreclosure, selling the home at auction, and applying the proceeds from the sale to pay down the outstanding debt)." *Glazer* v. *Chase Home Fin. LLC*, 704 F.3d 453, 461 (6th Cir. 2013). While the process undeniably involves a "security interest[]" (15 U.S.C. 1692a(6)), it just as undeniably involves collecting debts: "Whether through reinstatement or less directly through foreclosure sale and recovery of the proceeds, '[t]here can

be no serious doubt that the ultimate purpose of foreclosure is the payment of money.'" *Alaska Trustee, LLC* v. *Ambridge*, 372 P.3d 207, 216 (Alaska 2016).

Congress crafted the FDCPA in broad terms. It expressly contemplated foreclosure as "debt collection" in one of its substantive provisions (15 U.S.C. 1692i(a)(1)), and it expressly excluded groups elsewhere that it wished to exempt—yet (unsurprisingly) said nothing about foreclosure. The Act was designed to protect consumers from deception and abuse, and its protections are profoundly needed in this sensitive area: a foreclosure on a family's home "is likely to be a devastating prospect for the homeowner, who may therefore be particularly susceptible to abusive collection practices." *Ambridge*, 372 P.3d at 217.

Non-judicial foreclosure easily qualifies as "debt collection" according to the FDCPA's plain text, context, purpose, and history. The court of appeals erred in holding otherwise, and its judgment should be reversed.

STATEMENT

A. Background

1. a. Congress enacted the FDCPA in response to "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices." 15 U.S.C. 1692(a). It found this abuse was "a widespread and serious national problem," and it identified as a "primary" cause "the lack of meaningful legislation on the State level." S. Rep. No. 382, 95th Cong., 1st Sess. 2 (1977). Because "[e]xisting laws and procedures" proved "inadequate to protect consumers" (15 U.S.C. 1692(b)), Congress sought to impose baseline, comprehensive protections against debt-collector misconduct. 15 U.S.C. 1692(e).

Those protections took the form of "open-ended prohibitions," together with non-exhaustive lists of specific forbidden practices. *Jerman* v. *Carlisle, McNellie, Rini,*

Kramer & Ulrich LPA, 559 U.S. 573, 587 (2010); cf. S. Rep. No. 95-382, at 4. The Act targeted everything from aggression and violence (*e.g.*, 15 U.S.C. 1692d(1), (2)), to the use of "false or misleading representations," including misstating the "character, amount, or legal status of the debt," employing "deceptive means to collect" a debt, or demanding amounts not "expressly authorized by the agreement creating the debt or permitted by law" (15 U.S.C. 1692e(2), (10), 1692f(1)). See, *e.g.*, *Heintz* v. *Jenkins*, 514 U.S. 291, 292 (1995) (explaining the general prohibitions). The FDCPA also mandated a process for debt collectors to provide consumers notice of their alleged debts; this process granted consumers a specific right to dispute those debts, and required debt collectors to "cease collection of the debt" pending validation. 15 U.S.C. 1692g.

b. The FDPCA regulates solely the conduct of professional "debt collectors." The Act broadly defines "debt collector" as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. 1692a(6).[1] Any person meeting that definition is subject to the full panoply of the FDCPA's restrictions.

The Act further expands its coverage with an additional definition: "For purposes of section 1692f(6) of this title," the "term ['debt collector'] also includes any person

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[1] The Act also broadly defines "debt": the term "means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment." 15 U.S.C. 1692a(5).

who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is *the enforcement of security interests*." 15 U.S.C. 1692a(6) (emphasis added). Section 1692f(6), in turn, regulates conduct typical of repossession agents (*i.e.*, the classic "repo men"):

> Taking or threatening to take any non-judicial action to effect dispossession or disablement of property if—
>
> (A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;
>
> (B) there is no present intention to take possession of the property; or
>
> (C) the property is exempt by law from such dispossession or disablement.

15 U.S.C. 1692f(6). While the Act offers additional coverage for security enforcers, it does not textually exclude those qualifying under *both* definitions (the general and the additional) from the Act's general prohibitions.

This two-part definition of "debt collector" is followed by a list exempting six groups from the Act's scope. See 15 U.S.C. 1692a(6)(A)-(F). In enumerating these exemptions, Congress did not include entities pursuing foreclosures or enforcing other security interests.

B. Facts And Procedural History

1. In 2007, petitioner obtained a $329,940 home loan from Magnus Financial Corporation. Pet. App. 2a. At some point, the loan was transferred to other entities, and Wells Fargo Bank, N.A., began servicing the loan. *Id.* at 15a. Wells Fargo has since "'claimed numerous different owners of the note.'" *Id.* at 15a, 19a.

Between 2008 and 2012, Wells Fargo offered petitioner a variety of loan modifications. Pet. App. 15a. During that period, petitioner made 12 "trial payments" under three different modification offers. But rather than process the new loan modification, Wells Fargo "accepted the payments and applied them as 'late payments on the account and for other unspecified fees.'" *Ibid.* Petitioner received mixed communications from Wells Fargo throughout this time, including "'opposing messages [received] within days of each other.'" *Ibid.* Petitioner submitted complaints about Wells Fargo's conduct to the Federal Trade Commission. *Id.* at 15a-16a.

In 2009, petitioner defaulted on his loan, and Wells Fargo began non-judicial foreclosure proceedings. Pet. App. 2a, 15a. Over the next six years, Wells Fargo initiated multiple foreclosure attempts, but none were completed. *Id.* at 2a, 15a. It eventually retained respondent, a law firm, to pursue a foreclosure of petitioner's property. *Id.* at 2a, 16a. Respondent sent petitioner an "undated" letter in August 2014. *Id.* at 16a. It declared that respondent "may be considered a debt collector attempting to collect a debt," and "any information obtained will be used for that purpose." J.A. 37 (capitalization altered); Pet. App. 2a, 20a-21a. It advised petitioner of its intent to seek a non-judicial foreclosure, announced "the total amount of the debt currently owed," explained that "interest, late charges, and other charges" may increase "the amount due on the day you pay," instructed that "[t]he current creditor to whom the debt/loan is owed is[] Wells Fargo Bank, N.A.," and declared that it would "assume this debt to be valid unless [petitioner] dispute[s] its validity, or any

part of it, within 30 days after receiving this notice." J.A. 38; Pet. App. 2a.[2]

Petitioner responded to the letter with multiple objections. Pet. App. 2a, 16a; C.A. Supp. App. 124-125. He contested the alleged amount of the debt, and invoked the FDCPA's debt-validation procedures, which required respondent to cease all collection activity until confirming the validity of the debt and providing the necessary documentation to petitioner. Pet. App. 2a, 16a; see also 15 U.S.C. 1692g(a)-(b). Instead of validating the debt, respondent initiated a new foreclosure action in May 2015. Pet. App. 2a. In response, petitioner filed a complaint with the Consumer Financial Protection Bureau objecting to respondent's conduct. *Id.* at 16a.

2. In August 2015, petitioner filed this suit against respondent and Wells Fargo, asserting claims under the FDCPA and Colorado state law. Pet. App. 2a-3a, 16a. As relevant here, petitioner alleged that respondent was a debt collector, and its conduct violated multiple provisions of the FDCPA, including the debt-validation requirements of Section 1692g. *Id.* at 4a & n.2, 18a.

Respondent moved to dismiss, and the district court granted the motion. Pet. App. 14a-32a. As the sole basis for dismissal, the district court found that "the FDCPA does not apply to non-judicial foreclosures." *Id.* at 20a-21a. The court noted that "[n]ot all courts have agreed" on the issue, but it declared that "the majority" have decided "foreclosure activities are outside the scope of the FDCPA." *Id.* at 20a. It accordingly rejected "cases outside of this district" reaching the opposite conclusion

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[2] Respondent later sent additional notices concerning the foreclosure, including a payoff quote and notice of election and demand for sale by public trustee. J.A. 39-40, 44-45. The notice of election expressly acknowledged that the property would be sold "for the purpose of paying the indebtedness thereby secured." *Id.* at 40.

(*ibid.*), and dismissed the case against respondent. *Id.* at 21a, 32a.

3. A unanimous panel of the Tenth Circuit affirmed. Pet. App. 1a-13a.

Like the district court, the court of appeals recognized the stark disagreement over the question presented. Pet. App. 3a, 5a. In order to "settle this confusion," it requested "supplemental briefing on the issue," and ultimately "h[eld] that the FDCPA does not apply to non-judicial foreclosure proceedings." *Id.* at 3a, 5a-12a.

Before squarely addressing the dispositive issue, the court first cleared the path for a clean disposition. Pet. App. 5a. It initially rejected respondent's argument that petitioner had "failed to adequately allege a claim against it under the FDCPA." *Ibid.* At a minimum, the court found, petitioner "has sufficiently pled that [respondent] failed to verify [petitioner's] debt after it was disputed, in violation of § 1692g." *Ibid.* It likewise rejected respondent's argument—"claimed for the first time in oral argument"—that petitioner had somehow "waived the FDCPA claim against it." *Ibid.* On the contrary, the court explained, petitioner "specifically argue[d] in his opening brief that [respondent] 'violated the FDCPA by ignoring [a] valid written request related to verification of the debt and continued to collect.'" *Ibid.*[3]

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[3] The panel also affirmed the lower court's dismissal of petitioner's claims against Wells Fargo. As each court found, "[t]he FDCPA excludes 'any person collecting or attempting to collect any debt * * * which was not in default at the time it was obtained by such person.'" Pet. App. 4a (quoting 15 U.S.C. 1692a(6)(F)); *id.* at 18a. According to the panel, while it was unclear when (or if) Wells Fargo acquired the loan itself, petitioner "admit[ted] that Wells Fargo began servicing the loan before he went into default." *Id.* at 4a-5a; see also *id.* at 19a. That pre-default activity excluded Wells Fargo as a "debt collector" under the FDCPA. *Id.* at 5a, 19a-20a. Petitioner is not challenging that determination here.

Turning to the key issue, the court noted that "[w]hether the FDCPA applies to non-judicial foreclosure proceedings has divided the circuits." Pet. App. 5a. It stated that the "Ninth Circuit, along with numerous district courts, has held that non-judicial foreclosure proceedings are not covered under the FDCPA" (*id.* at 5a), while "[t]he Fourth, Fifth, and Sixth Circuits, as well as the Colorado Supreme Court," have taken the opposite position. *Id.* at 5a-6a (citing *Wilson* v. *Draper & Goldberg, P.L.L.C.*, 443 F.3d 373 (4th Cir. 2006), *Kaltenbach* v. *Richards*, 464 F.3d 524 (5th Cir. 2006), *Glazer* v. *Chase Home Fin. LLC*, 704 F.3d 453 (6th Cir. 2013), and *Shapiro & Meinhold* v. *Zartman*, 823 P.2d 120 (Colo. 1992)). The panel also flagged conflicting decisions and "confusion" in the District of Colorado, emphasizing the need "to provide clarity in this circuit." *Id.* at 3a, 6a & n.3.

The panel started its analysis with the "plain language of the FDCPA." Pet. App. 5a-6a. Agreeing with the Ninth Circuit, the panel reasoned that "debt is synonymous with 'money,'" and the FDCPA applies "'only when an entity is attempting to collect' money." *Id.* at 7a (quoting *Ho* v. *ReconTrust Co., NA*, 858 F.3d 568, 571-572 (9th Cir. 2017)). Because non-judicial foreclosures do not obligate consumers "'to pay money,'" the panel reasoned, such foreclosures are "not covered under the FDCPA." *Ibid.*

In reaching this conclusion, the panel expressly rejected "the Sixth Circuit's decision in *Glazer*." Pet. App. 8a (quoting *Glazer*'s "contrary" holding that "'*every* mortgage foreclosure' * * * is undertaken for the very purpose of obtaining payment on the underlying debt, either by persuasion * * * or compulsion'"). According to the panel, this "contrary position" fails because non-judicial foreclosure does not permit collection "'personally against the mortgagor.'" *Ibid.* While a creditor could "collect a defi-

ciency" in a "separate action" after the "non-judicial foreclosure sale" (*id.* at 8a-9a (citing Colorado law)), the foreclosure itself "only allows 'the trustee to obtain proceeds from the sale of the foreclosed property, and no more'" (*id.* at 9a). The panel thus found that it did not qualify as a "direct[] or indirect[]" attempt (15 U.S.C. 1692a(6)) to collect a debt. Pet. App. 6a-9a.

Next, the panel rejected other courts' reliance on "§ 1692i—'Legal actions by debt collectors'—as evidence that Congress intended the FDCPA to apply to mortgage foreclosures." Pet. App. 9a. That section regulates permissible venue for "action[s] to enforce an interest in real property securing the consumer's obligation." 15 U.S.C. 1692i(a)(1). Although other courts read this language as necessarily confirming that "debt collection" includes foreclosure actions (the subject of Section 1692i), the panel "disagree[d]." Pet. App. 10a. It reasserted its view that seeking non-judicial foreclosure falls outside Section 1692a(6), and it further noted that Section 1692i only covers "judicial proceeding[s]," whereas "*non-judicial*" foreclosures "plainly do[] not fall under this definition." *Ibid.*

Finally, the panel asserted that "policy considerations" support its holding. Pet. App. 10a. It reasoned that applying the FDCPA in this context "would conflict with Colorado mortgage foreclosure law." *Id.* at 10a-11a (citing two examples where Colo. R. Civ. P. 120 requires "notice" arguably conflicting with the FDCPA). The panel stated that "mortgage foreclosure is 'an essential state interest,'" and found "no 'clear and manifest' intention on the

part of Congress to supplant state non-judicial foreclosure law." *Id.* at 11a.[4] In doing so, the panel rejected other courts' "contrary conclusion" that Congress would not have intended to "immunize debt secured by real property where foreclosure was used to collect the debt." *Id.* at 12a (citing conflicting decisions from the Third and Fourth Circuits).[5]

SUMMARY OF ARGUMENT

Although this question has divided the circuits, its proper disposition is remarkably straightforward. Non-judicial foreclosure qualifies as debt collection under the FDCPA, and that follows directly under the Act's text, context, purpose, and history. The Tenth Circuit's contrary determination was plainly wrong, and its judgment should accordingly be reversed.

I. A. The FDCPA defines a "debt collector" as any person who regularly collects, directly or indirectly, debts owed or due another. As this Court has already recognized, "[t]o collect a debt * * * is to obtain payment or liquidation of it." *Heintz*, 514 U.S. at 294 (quoting *Black's Law Dictionary* 263 (6th ed. 1990)).

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[4] The panel earlier acknowledged commentary from the "Colorado Rule 120 Committee" recommending, in response to "'considerable debate'" over the FDCPA's applicability, that persons conducting non-judicial foreclosures "'comply'" with the FDCPA, "'notwithstanding any provision of this Rule.'" Pet. App. 6a n.3.

[5] The panel "left for another day" the distinct question whether "more aggressive collection efforts leveraging the threat of foreclosure into the payment of money" would "constitute 'debt collection.'" Pet. App. 12a. While both the Ninth and Tenth Circuits have raised that possibility, the core split among the circuits is whether non-judicial foreclosure *without* additional conduct qualifies as debt collection. *Id.* at 5a (acknowledging the conflict over this question). This is why the panel recognized its holding was necessary to resolve the rampant "confusion" in the lower courts. *Id.* at 3a, 6a & n.3.

That describes non-judicial foreclosure exactly. A non-judicial foreclosure directly attempts to collect a debt by threating the foreclosure itself. The pre-foreclosure notices declare a default, provide information on how to cure that default, and lay out the devastating consequence of failing to pay—losing one's home. With or without an express demand for payment, the message is unmistakably clear. Consumers are often left to cobble together any available funds to stave off foreclosure, and the notices serve as an obvious demand for payment.

Even if that demand fails, the foreclosure itself is an indirect attempt to collect the debt. The entire point of the foreclosure is to liquidate the asset and pay the underlying debt. Enforcing the security interest does not simply return the property to the creditor; the foreclosure, by law, automatically puts the house up for sale, and the proceeds are designated to pay down the debt. And this, again, is all assuming the consumer does not pay the debt outright to avoid the devastating prospect of losing his or her home.

B. This common-sense understanding is confirmed by the Act's context and purpose. In the Act's substantive provisions, Congress included a venue provision regulating foreclosure—an undeniable indication that it understood foreclosures were covered by the Act. And while Congress excluded other groups from the Act's scope, it conspicuously elected not to exclude foreclosure agents. It instead framed the Act's coverage in broad terms that readily capture foreclosure activity. Respondents have no basis for crafting a silent exception that appears nowhere in the Act's actual text.

The statutory purpose is also advanced by covering non-judicial foreclosure. Stripping away the FDCPA's protections would leave consumers vulnerable in an area

that hits (literally) closest to home. And that context presents the same risks and dangers of abuse and deceptive conduct found elsewhere; indeed, the problems are heightened given the desperation consumers often feel in trying to save the family home.

C. The same conclusion is reinforced by the Act's history. Congress specifically referenced mortgages and mortgage servicers in reviewing the Act. Given that foreclosure is a primary debt-collection tool in that context, it is inconceivable that Congress intended to exclude non-judicial foreclosure at the same time it effectively confirmed that mortgages would be included in the Act's coverage.

II. Respondents attempts to avoid the FDCPA's protections are unavailing.

A. First, it makes no difference that non-judicial foreclosure involves a security interest. Under the FDCPA's plain language, "debt collection" can involve the enforcement of security interests, so long as it *also* involves an attempt, "directly or indirectly," to collect a debt. The additional definition applies where one does not *otherwise* qualify under the general definition; it does not exclude those who qualify under both prongs.

Moreover, the additional definition plainly targets classic "repo" activity—attempts to take collateral and return it the creditor, not an attempt to collect or liquidate the debt.

B. Second, respondents' resort to federalism principles falls short. Congress already regulates in this area, so there is no basis to presume any special solicitude for local control. And the federal and state schemes easily coexist, which is why courts rejecting respondents' rule have not seen their foreclosure systems grind to a halt.

In any event, Congress already instructed courts how to resolve any possible incompatibilities in this area: Section 1692n says that inconsistent state laws are preempted to the extent they provide lesser coverage. That is consistent with Congress's express statement of purpose: it was providing a nationwide, baseline set of rules, and doing so precisely because state laws had proven inadequate. It makes little sense to presume that Congress abandoned that stated purpose (without saying a word about it) in the foreclosure context alone.

ARGUMENT

I. NON-JUDICIAL FORECLOSURE CONSITUTES DEBT COLLECTION UNDER THE FDCPA

A. According To The Act's Plain And Ordinary Meaning, Non-Judicial Foreclosure Qualifies As "Debt Collection"

The FDCPA defines a "debt collector" as "any person" who "regularly collects or attempts to collect, directly or indirectly, debts owed or due * * * another." 15 U.S.C. 1692a(6). In every plain and ordinary sense, non-judicial foreclosure satisfies that definition as a "direct[] or indirect[]" method of collecting a debt.[6]

1. a. Non-judicial foreclosure is a "direct" attempt to collect a debt. The foreclosure process starts with a series of notices, which announce the overdue debt and explain the prospect of foreclosure. See, *e.g.*, Colo. Rev. Stat. §§ 38-38-101(4), 38-38-102.5(2)(b), 38-38-103. It is obvious to anyone what these notices mean. They instruct the amounts owed, explain the consequences of failing to pay, detail the opportunity to cure (which means *paying the*

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[6] In *Jerman*, this Court addressed a different question under the FDCPA in a case that also arose in the foreclosure context. See 559 U.S. at 578-579. Not a single member of the Court raised any doubt that foreclosures were covered by the FDCPA.

debt), and disclose loss-mitigation avenues, which represent different ways of paying the debt. To a consumer, these notices are indistinguishable from a letter noting that a debt is overdue and the failure to pay will lead to a lawsuit. The only difference is the harsher consequence (losing one's home) of not paying.

Respondents' notices in this case underscore the clear effect of the message. These documents declare that the "foreclosure" process is being "commence[d]" (J.A. 37); state "the total amount of the debt currently owed" (*id.* at 38); explain that, "[b]ecause of interest, late charges, and other charges," "the amount due on the day you pay may be greater" (*ibid.*); identify "[t]he current creditor to whom the debt/loan is owed" (*ibid.*); provide information for a "[l]oss [m]itigation" representative (*id.* at 42); declare a "failure to make timely payments" (*id.* at 39); provide a "payoff quote" (*id.* at 44); explain that "[w]aiting to make your payment may increase the amount necessary to cure the default" (*id.* at 45); and advise that "you should submit payment as quickly as possible to avoid incurring any additional fees or costs" (*ibid.*).

The import is loud and clear to any ordinary consumer: if the "amount due" is not paid, she faces the shattering consequence of losing her home. *E.g.*, *Ambridge*, 372 P.3d at 217-218. That imposes at least as strong an incentive to pay up as the desire to avoid a lawsuit over an unpaid $50 phone bill. And, in fact, the process does indeed prompt payments: in 2017 alone, over 10% of consumers cured their defaults to avoid foreclosure, and 71% of foreclosures were withdrawn before sale (some due to loan modifications, which ensure continued payment of the debt). See Colorado County Treasurers & Public Trustees, *2017 Statewide Pub. Tr. Statistics* (Feb. 16, 2018) <https://tinyurl.com/2017-colo-stats>.

Far from simply enforcing a security interest, this shows that the process works as intended—it often induces payment to avoid the devastating personal and financial effects of losing one's home. It simply blinks reality to suggest this kind of notice—announcing an upcoming foreclosure absent some form of payment—is not a direct attempt to collect a debt.[7]

b. As a matter of simple common sense, these notices are collection attempts, and there is no basis for excluding them from the Act's reach.

First, it is irrelevant that these notices are generally required by state law. See, *e.g.*, *Piper* v. *Portnoff Law Assocs., Ltd.*, 396 F.3d 227, 235 (3d. Cir. 2005); *Romea* v. *Heiberger & Assocs.*, 163 F.3d 111, 116 (2d Cir. 1998); *Ambridge*, 372 P.3d at 217-218. Congress did not textually exempt state-mandated notices from the FDCPA, and for good reason. Suppose, for example, that a State believed it was so important to avoid foreclosure that it required persons to demand full payment three times (in classic dunning letters) before enforcing a security interest. No one would reasonably suggest that those three demands fall outside the FDCPA because they were mandated by state law.

The entire point of the Act was to provide baseline protections because state law was often inadequate. 15 U.S.C. 1692(b). It would flip the FDCPA's purpose on its head to

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[7] The Tenth Circuit admitted that "[h]ad McCarthy attempted to induce Mr. Obduskey to pay money by threatening foreclosure, the FDCPA might apply." Pet. App. 9a. This ignores that, understood for a real-world perspective, *all* pre-foreclosure notices are attempts to induce payment—indirectly if not directly.

excuse deficient or improper conduct because the State demanded it. See, *e.g.*, *Piper*, 396 F.3d at 236 & n.11.[8]

Second, according to the Ninth Circuit, if effectuating the *actual* foreclosure is not "debt collection" (contra Part I.A.2, *infra*), then the same entity "must be able to maintain that status when it takes the statutorily required steps to conduct the trustee's sale." *Ho* v. *ReconTrust Co., NA*, 858 F.3d 568, 573 (9th Cir.), cert. denied, 138 S. Ct. 504 (2017). This is a non-sequitur. The fact that *earlier* activity is a prerequisite to *later* activity does not transform an obvious act of debt collection into something else. If an attempt to enforce a security interest involves *both* security enforcement and "attempts to collect, directly or indirectly, debts owed," the party is a "debt collector." 15 U.S.C. 1692a(6).

Third, nor does it matter whether respondent's notices included an "express" demand for payment. Contra *Ho*, 858 F.3d at 574. "There is no meaningful distinction between a demand for repayment and a statement of the consequences for failure to make repayment. The expected effect on the recipient's behavior is the same." *Lapan* v. *Greenspoon Marder P.A.*, No. 5:17-cv-130, 2018 WL 1033224, at *4 (D. Vt. Feb. 22, 2018). And that is assuredly true here. The notice's message was unmistakable: pay up or lose your house. There is no need to read between the lines. A consumer who receives a notice that they will lose their home to foreclosure unless they pay a deficiency or apply for a modification understands the no-

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[8] Moreover, the lack of an exemption is presumptively deliberate: Congress excluded other groups from the Act's scope (*e.g.*, 15 U.S.C. 1692a(6)(C) (excusing state "officer[s] or employee[s]" who collect official state debts)), but did not likewise protect formal notices required by state law.

tice as an attempt to collect their debt. Any theoretical difference between that type of notice and an explicit payment demand is immaterial.

Moreover, "nothing in [the] language [of the FDCPA] *requires* that a debt collector's misrepresentation [or other violative actions] be made as part of an *express demand for payment*." *McCray* v. *Fed. Home Loan Mortg. Corp.*, 839 F.3d 354, 359 (4th Cir. 2016). On the contrary, the FDCPA textually covers direct *or indirect* attempts to collect a debt, and a strong hint to pay (by setting out the consequences of *not* paying) qualifies, at a minimum, as an indirect attempt to collect a debt. See, *e.g.*, *McLaughlin* v. *Phelan Hallinan & Schmieg, LLP*, 756 F.3d 240, 245-246 (3d Cir. 2014) ("discussions of the status of payment [and] offers of alternatives to default" may constitute debt collection; "a communication need not contain an explicit demand for payment to constitute debt collection activity").

Finally, the Tenth Circuit suggested that, while the notices here were not enough, "more aggressive collection efforts leveraging the threat of foreclosure" may constitute debt collection. Pet. App. 12a. But it is difficult to draw an administrable line between so-called "aggressive" and more plain-vanilla demand letters. In this context, each letter will at least notify the debtor that a certain amount is owed and explain that the creditor will foreclose absent payment or cure. See Colo. Rev. Stat. § 38-38-101(4). An explicit demand (or explicit threat) may make the message more emphatic, but all the material components are the same. The Tenth Circuit's standard is unworkable, and it would predictably invite pointless and

time-consuming litigation while eliminating clear guidance for regulated entities.[9]

2. At a minimum, non-judicial foreclosure is an "indirect" attempt to collect a debt. *E.g.*, *Glazer*, 704 F.3d at 461; *Shapiro*, 823 P.2d at 124 ("a foreclosure is a method of collecting a debt by acquiring and selling secured property to satisfy a debt").

As *Heintz* established, collecting a debt means "to obtain payment or liquidation of it." 514 U.S. at 294 (quoting *Black's Law Dictionary* 263 (6th ed. 1990)). That is exactly what non-judicial foreclosure is designed to do. A foreclosure sells the house to pay the debt. The sale's proceeds go to the creditor until the debt is satisfied. Colo. Rev. Stat. § 38-38-111(1). Any excess goes to the consumer (Colo. Rev. Stat. § 38-38-111(2)), and any shortage is marked as a deficiency, subject to collection in a separate lawsuit (Colo. Rev. Stat. § 38-38-106(6)). That fits precisely within the ordinary, plain meaning of "collection": the asset is liquidated to pay the debt. *E.g.*, *Ambridge*, 372 P.3d at 216 ("foreclosing on property, selling it, and applying the proceeds to the underlying indebtedness constitute one way of collecting a debt—if not directly at least indirectly").

This further describes how respondents themselves understand the procedure. Their notice of election and demand was unequivocal: they demanded that the public trustee "sell said property *for the purpose of paying the indebtedness thereby secured.*" J.A. 40 (emphasis added). This illustrates that, contrary to respondents' contention, non-judicial foreclosure does indeed "permit the creditor

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[9] For example, a foreclosure notice that includes a payment stub—without any explicit demand to use it—is surely requesting payment, especially against the backdrop of a threat to sell the house to pay the debt. But it is unclear whether any court would find that sufficiently "aggressive" to meet the Tenth Circuit's standard.

to obtain the payment of * * * money." Br. in Opp. 12. It does so deliberately by liquidating the debt.

According to the Ninth Circuit, however, "the object of a nonjudicial foreclosure is to retake and resell the security, not to collect money *from the borrower*." *Ho*, 858 F.3d at 571 (emphasis added). This misses the point. The reason for "retaking and reselling the security" was precisely to "collect money" by *liquidating the borrower's debt*. The statutory definition does not say that the money must come directly from the consumer's pocket. Cf., *e.g.*, 15 U.S.C. 1692a(2) (a "communication" can be made "directly or indirectly to any person through any medium"). It textually asks whether the party is "attempt[ing] to collect, directly or indirectly, *debts owed*"—which it does by "obtaining payment *or liquidation of it*." *Heintz*, 514 U.S. 294. Selling petitioner's house to pay off petitioner's debt fits squarely within the plain meaning of the FDCPA. See *Ho*, 858 F.3d at 578 (Korman, D.J., dissenting) (under the Act's plain text, it does not "matter that the money collected at a foreclosure sale does not come directly from the debtor").[10]

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[10] It makes sense that the statutory definition does not turn on *where* the money comes from; all that matters is that the person attempts to collect the debt (by payment or liquidation) that the consumer "owed." 15 U.S.C. 1692a(6). The Act's surrounding provisions confirm that the text means what it says. Congress thus created express protections for parents and spouses who a debt collector may contact (15 U.S.C. 1692c(d)), prohibited debt collectors from "harass[ing], oppress[ing], or abus[ing] *any* person in connection with the collection of a debt" (15 U.S.C. 1692d)), and broadly defined "communication" to reach "conveying information regarding a debt directly or indirectly to *any* person through any medium" (15 U.S.C. 1692a(2)). Otherwise, debt collectors would be free to engage in abusive tactics to pressure a debtor's parents or spouse for the money. (In any event, for obvious reasons, when a debt is "liquidated," the source of funds will usually be third parties.)

B. The FDCPA's Context And Purpose Confirm That Non-Judicial Foreclosure Is Subject To The Act

The FDCPA's context and purpose readily confirm what the text already makes clear: non-judicial foreclosure qualifies as debt collection.

1. The FDCPA's surrounding provisions reaffirm that non-judicial foreclosure is covered.

First and foremost, Congress included a substantive provision that expressly contemplates that foreclosure constitutes "debt collection." Under 15 U.S.C. 1692i(a)(1), Congress specified the venue for "debt collectors" bringing "action[s] to enforce an interest in real property securing the consumer's obligation." This provision is an obvious reference to foreclosures (*i.e.*, an "action to enforce an interest in real property"), and it applies exclusively to "debt collectors." See *Cohen* v. *Rosicki & Assocs., P.C.*, 897 F.3d 75, 83 (2d Cir. 2018). This provision only makes sense if Congress understood that foreclosures would fall within the Act's reach. See, *e.g.*, *Glazer*, 704 F.3d at 462. Respondents' reading, by contrast, would leave this substantive provision with no realistic application. *E.g.*, *Kaltenbach* v. *Richards*, 464 F.3d 524, 528 (5th Cir. 2006) (explaining how a contrary reading would leave Section 1692i(a)(1) "without effect").

Second, Congress expressly excluded certain groups, *but not entities pursuing foreclosures*, from the FDCPA's scope. See 15 U.S.C. 1692a(6) (enumerating six such categories). These exclusions appear in the same section that defines "debt collector." When Congress wanted to carve out an exception, it thus did so expressly. But it otherwise framed the Act's coverage in broad terms (15 U.S.C. 1692a(6) (covering "any person" in "any business" collecting "any debts")), and there is no basis for silently cutting back the language's natural reach. See, *e.g.*, *Ambridge*, 372 P.3d at 217; *Shapiro*, 823 P.2d at 124; see also S. Rep.

No. 95-382, at 3 ("The committee intends the term 'debt collector,' subject to the exclusions below, to cover *all third persons* who regularly collect debts for others.") (emphasis added).[11]

2. The FDCPA's purpose is plainly advanced by covering non-judicial foreclosure.

Congress enacted the FDCPA because "many" debt collectors were engaged in "abusive" and "deceptive" practices (15 U.S.C. 1692(a)), and existing laws (including state laws) had proven "inadequate" in preventing consumer harm (15 U.S.C. 1692(b)). There is no indication that the foreclosure context was immune to these systemic problems, or that Congress would have tolerated this abuse where consumers face the devastating loss of a family home.

On the contrary, Congress would have every reason to be especially concerned in this context. See, *e.g.*, *Ambridge*, 372 P.3d at 217. Consumers are vulnerable and face a high risk of abuse given the grave consequences. And abusive debt collectors can exploit a competitive advantage by relying on shoddy or unethical work. Yet errors in this context are far more intolerable than errors in other collection settings. A family could lose its home if a debt collector falsely inflates the amounts owed beyond the family's capacity to cure, or a consumer is left without the information necessary to make an informed decision

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[11] Congress also defined "debt" as "*any* obligation," not just unsecured obligations. 15 U.S.C. 1692a(5); see also, *e.g.*, *Reese* v. *Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211, 1218 (11th Cir. 2012) ("A debt is still a 'debt' even if it is secured."). If Congress felt that all security interests should be treated differently, it would have said so expressly. See, *e.g.*, *Ambridge*, 372 P.3d at 213 ("The definition of 'debt' plainly encompasses a home mortgage, * * * and the definition does not differentiate between consumer debts that are secured and those that are not.").

to pay the debt, challenge the demand, or accede in the consequences of default.

A family's home is typically its most important asset. It is where children are raised, and communities are formed. "Foreclosures also have unquantifiable but serious social costs because so many social relationships, such as school, medical care, religious congregations, friendships, and employment are geographically based, and are sometimes rent asunder by the relocation of foreclosed homeowners and their families." A. Levitin & T. Twomey, *Mortgage Servicing*, 28 Yale J. on Reg. 1, 84 (2011). The FDCPA provides critical safeguards to root out debt-collector mistakes, ward off abusive conduct, and ensure fair and honest treatment. If Congress intended to create a massive "loophole" for this significant category of consumer debt, it would have said so expressly. *Kaymark* v. *Bank of Am., N.A.*, 783 F.3d 168, 179 (3d Cir. 2015); *Wilson*, 443 F.3d at 378-379.

In sum, there is no apparent reason that Congress would regulate all manner of collection activity (including state-court litigation), yet would not regulate non-judicial foreclosure. Respondents' attempt to read an atextual exclusion into the Act is directly at odds with its language, context, and purpose, and it should be rejected.[12]

C. The FDCPA's Legislative History Further Confirms That Non-Judicial Foreclosure Qualifies As Debt Collection

The legislative history further confirms that Congress intended the FDCPA to apply in this setting. The key

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[12] Nor does reading the Act to mean what it says impose a particularly high bar. Whether the Act applies is a threshold question. The fact that it applies does not mean that every foreclosure is actionable; it simply means that debt collectors must honor the same general rules that they honor in every other collection context.

Senate report stated that the "[t]he collection of debts, *such as mortgages* and student loans, by persons who originated such loans" is not debt collection. S. Rep. No. 95-382, at 3 (1977) (emphasis added). This "impl[ies] that the collection of mortgages by persons who did *not* originate such loans *is* debt collection." *Ambridge*, 372 P.3d at 213. And the same report likewise stated that "mortgage service companies" are not covered "so long as the debts were not in default when taken for servicing." S. Rep. No. 95-382, at 3-4. This again reflects that "the activities of mortgage service companies *are* covered if they otherwise meet the statutory definition." *Ambridge*, 372 P.3d at 213.

These references to mortgages and mortgage service companies are telling. Foreclosures are a primary tool for enforcing mortgage obligations, and they are at least an obvious consideration in the context of addressing how debt collectors may operate in the fields of "mortgages" and "mortgage servicing." It would be especially odd for Congress to include these references without any hint that foreclosures are excluded. And at a minimum, these references show "Congress's awareness that unfair debt collection practices occurred in the same regulated arena." *Ambridge*, 372 P.3d at 214.

There is little need to resort to legislative history in light of the clear text, context, and purpose. But it is little surprise that Congress's background work reflects the same intent that appears on the face of the statute: the FDCPA broadly covers those seeking to collect debts (directly or indirectly), and its sweep readily includes those pursuing non-judicial foreclosure.

II. RESPONDENTS' REMAINING EFFORTS TO EVADE THE FDCPA'S BASIC SAFEGUARDS ARE MERITLESS

A. According to respondents, non-judicial foreclosure is the mere enforcement of a "security interest," not an

attempt to collect a debt. Br. in Opp. 12. Thus, respondents argue, "[i]f initiating a non-judicial foreclosure were sufficient to make an entity a debt collector, it would render meaningless the FDCPA's distinction between 'the enforcement of [a] security interest[]' and 'the collection of a[] debt[].'" *Ibid.*

This is baseless. The argument initially fails in its premise, because (as established above) non-judicial foreclosure most assuredly *does* constitute debt collection. The foreclosure process is not the same as retrieving a car parked on the street in the middle of the night; it is forcing the sale of a house *to liquidate a debt.* The sale generates proceeds, and those proceeds are designated for the creditor—in order to satisfy the debt. Colo. Rev. Stat. § 38-38-111(1). And that all assumes the prospect of foreclosure—clearly stated in pre-foreclosure notices—fails to induce payment in advance.

The FDCPA sets out the additional definition (for security enforcement) *as an addition.* It expands, not constricts, the main definition's coverage. See 15 U.S.C. 1692a(6) ("[f]or purpose of section 1692f(6) of this title, such term *also* includes"). It includes additional coverage for those who engage *only* in the enforcement of a security interest without also qualifying under the main definition, which itself already subjects the entity to the Act's full scope. The fact that respondents qualify as "debt collectors" under the main definition—irrespective of their efforts to enforce a security interest—eviscerates their position.

For similar reasons, respondents are wrong that petitioner's view renders "meaningless" the distinction between security enforcement and debt collection. The additional definition covers classic "repo" activity—efforts to "dispossess[] or disable[]" property *without* seeking payment or liquidation of a debt. See *Glazer*, 704 F.3d at

463-464; *Piper*, 396 F.3d at 236. This is confirmed by the scope of coverage under Section 1692f(6), the single provision this subcategory must follow. See 15 U.S.C. 1692f(6) (focusing on issues concerning "non-judicial action to effect dispossession or disablement of property"). While these substantive prohibitions make sense for things like towing cars and changing locks, they have an uncomfortable fit for foreclosures. *E.g.*, *Ho*, 858 F.3d at 583 (Korman, D.J., dissenting). And this is why courts have recognized that virtually "all of the cases" involving the additional definition and Section 1692f(6) involve "repo men," not non-judicial foreclosures. *Glazer*, 704 F.3d at 464.[13]

B. Respondents, mirroring the Ninth and Tenth Circuits, also argue that mortgage foreclosure is a traditional state interest, and the FDCPA fails to reflect a clear intent to displace state law in this area. Br. in Opp. 12; see also Pet. App. 10a-12a; *Ho*, 858 F.3d at 576. This argument fails on multiple levels.

First, respondents' argument is factually flawed. Even if foreclosure were a traditional state interest, Congress has heavily regulated in this area. It specifically regulates venue under Section 1692i(a)(1). All sides further agree that the FDCPA covers *judicial* foreclosures, which begs the question why Congress would hesitate to regulate *out-of-court* conduct while intruding into state *judicial* foreclosures. Aside from the FDCPA, Congress additionally regulates state foreclosures under laws like TILA, RESPA, and the Bankruptcy Code. See Br. in Opp. 22 (conceding the existence of such regulation).

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[13] Moreover, when a person tows a car in the middle of the night, there is limited communication. The point is not to liquidate a debt, but to seize the car and return it to the creditor.

It would be passing strange for Congress to freely regulate all of these interests but draw the line at non-judicial foreclosures. Respondents have not yet articulated any basis to attribute such an odd policy preference to Congress's silence.

Second, in any event, this is *not* a situation of statutory silence. This is a case of *express* preemption. Congress specifically said that state laws are preempted that conflict with the FDCPA. 15 U.S.C. 1692n. It explained that the FDCPA serves as a backstop and provides minimum coverage. 15 U.S.C. 1692(e). It explained that state and local laws were inadequate. 15 U.S.C. 1692(b). And it created a mandatory exemption where States that provide equivalent coverage can be excused from the FDCPA. 15 U.S.C. 1692*o*.

That scheme reflects how Congress balanced the federalism concerns in this area, and it did so expressly. There is no exception for non-judicial foreclosure, and no reason to think the preemption provision does not mean what it plainly says.[14]

Third, respondents' "conflicts" are overstated. Complying with both state and federal law is not difficult once each regime is read sensibly (*Heintz*, 514 U.S. at 296-297), which is why no circuit rejecting respondents' theory has encountered problems. See *id.* at at 296-297 (it is "easier to read" the conduct-regulating provisions as providing some "additional, implicit exception" than to create a "far

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[14] Moreover, the legislative history reflects that Congress specifically considered federalism concerns in providing national regulations for debt collectors. See, *e.g.*, S. Rep. No. 95-382, at 10 (recounting additional dissenting views). There are no "foreclosure" accommodations in the statutory text, and there is no license for the judiciary to craft an exemption that Congress did not. *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017).

broader exception" that appears nowhere in the Act's text). And, again, if the schemes do conflict, Congress instructed how to respond: federal law preempts state law, not vice versa. 15 U.S.C. 1692n. The FDCPA supplies a backstop against inadequate state procedures (15 U.S.C. 1692(b)); there is no license to displace the FDCPA because a state scheme providing *less* protection gets in the way.[15]

Finally, the FDCPA's construction is a question of *federal* law. It makes little sense to permanently construe a federal statute—which applies uniformly in all 50 States—to avoid a conflict with a handful of Colorado regulations that could change at any time. The FDCPA assumes a uniform meaning nationwide; it does not vary based on particular "conflicts" that might arise with any local scheme. Cf. *Clark* v. *Martinez*, 543 U.S. 371, 382 (2005). Respondents' contrary approach lets the tail wag the dog.[16]

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[15] Indeed, Colorado itself has already adjusted to federal regulation, showing how the two schemes easily coexist. See, *e.g.*, Colo. Rev. Stat. §§ 38-38-103.1(1) (accommodating "federal law and CFPB rules and orders"), 38-38-109(2) (accommodating "the federal bankruptcy code").

[16] Congress passed baseline standards to protect consumers. If Colorado believes its own conflicting standards (if any) are more protective, it can always apply for an exemption from the agency tasked with enforcing the scheme. But it stands the law on its head to say the uniform *federal* standards give way once any single *State* adopts a different standard in the same area.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

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SEPTEMBER 2018

APPENDIX

APPENDIX

1. 15 U.S.C. 1692 provides:

Congressional findings and declaration of purpose

(a) Abusive practices

There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.

(b) Inadequacy of laws

Existing laws and procedures for redressing these injuries are inadequate to protect consumers.

(c) Available non-abusive collection methods

Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts.

(d) Interstate commerce

Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.

(e) Purposes

It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

2. 15 U.S.C. 1692a provides in pertinent part:

Definitions

As used in this subchapter—

* * * * *

(3) The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.

* * * * *

(5) The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

(6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last

sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include—

(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

(B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;

(C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;

(D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

(E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and

(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide

fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

* * * * *

3. 15 U.S.C. 1692f provides in pertinent part:

Unfair practices

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

* * * * *

(6) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if—

(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;

(B) there is no present intention to take possession of the property; or

(C) the property is exempt by law from such dispossession or disablement.

* * * * *

4. 15 U.S.C. 1692i(a) provides in pertinent part:

Legal actions by debt collectors

(a) Venue

Any debt collector who brings any legal action on a debt against any consumer shall—

(1) in the case of an action to enforce an interest in real property securing the consumer's obligation, bring such action only in a judicial district or similar legal entity in which such real property is located * * * .

* * * * *

5. 15 U.S.C. 1692n provides:

Relation to State laws

This subchapter does not annul, alter, or affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency. For purposes of this section, a State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection provided by this subchapter.

6. 15 U.S.C. 1692*o* provides:

Exemption for State regulation

The Bureau shall by regulation exempt from the requirements of this subchapter any class of debt collection practices within any State if the Bureau determines that

under the law of that State that class of debt collection practices is subject to requirements substantially similar to those imposed by this subchapter, and that there is adequate provision for enforcement.

No. 17-1307

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DENNIS OBDUSKEY, PETITIONER

v.

MCCARTHY & HOLTHUS LLP, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether an entity that initiates a non-judicial foreclosure to enforce a security interest under Colorado law thereby engages in debt collection for purposes of the Fair Debt Collection Practices Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 879 F.3d 1216. The order of the district court (Pet. App. 14a-32a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 2018. The petition for a writ of certiorari was filed on March 13, 2018, and granted on June 28, 2018. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Fair Debt Collection Practices Act, 15 U.S.C. 1692-1692p, is reproduced in an appendix to this brief.

STATEMENT

This case concerns the application of the Fair Debt Collection Practices Act (FDCPA) to a particular type of foreclosure activity governed by state law. The FDCPA bars debt collectors from engaging in certain practices while attempting to collect debts. In defining "debt collector," the FDCPA distinguishes between entities that primarily engage in "the collection of any debts" and entities that primarily engage in the "enforcement of security interests." 15 U.S.C. 1692a(6). Entities in the former category are "debt collectors" subject to the FDCPA for all purposes; those in the latter category are subject only to a specific provision of the FDCPA not at issue here. The question presented in this case is whether enforcing a security interest by initiating a non-judicial foreclosure (*i.e.*, a foreclosure with limited judicial involvement) constitutes debt collection under the FDCPA.

Petitioner, a Colorado resident, obtained a loan that was secured by a residential property and serviced by a bank. Petitioner defaulted on the loan and stopped making payments. Several years later, the bank hired respondent McCarthy & Holthus LLP, a law firm, to pursue a non-judicial foreclosure of the property under Colorado law. Respondent notified petitioner that it had been instructed to commence the foreclosure process. It then initiated a non-judicial foreclosure, which would allow sale of the property, in accordance with Colorado law.

As is relevant here, petitioner filed suit against respondent, contending that, by initiating a non-judicial foreclosure, respondent had engaged in prohibited debt-collection activity under the FDCPA. The district court

dismissed that claim. The court of appeals affirmed. It reasoned that, by initiating the foreclosure, respondent was enforcing a security interest. And the court held that merely enforcing such an interest, without attempting to obtain money from the debtor, does not constitute debt collection under the FDCPA. The court of appeals' holding is correct, and its judgment should therefore be affirmed.

A. Background

1. The FDCPA bars debt collectors from engaging in certain practices while attempting to collect debts. 15 U.S.C. 1692c-1692h, 1692k; see 15 U.S.C. 1692(e). Of particular relevance here, it provides that, when a consumer disputes the validity of a debt, a debt collector "shall cease collection" until the collector provides the consumer with verification of the debt. 15 U.S.C. 1692g(b).

The FDCPA defines "debt" as an actual or alleged "obligation of a consumer to pay money." 15 U.S.C. 1692a(5). And the FDCPA defines a "debt collector," in turn, as an entity that engages in "any business the principal purpose of which is the collection of any debts," or that "regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another": *i.e.*, an entity whose overall practices involve sufficiently frequent debt collection. 15 U.S.C. 1692a(6); *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1721 (2017). "For the purpose of" a provision not at issue here (which prohibits threatening or taking actions to effect dispossession or disablement of property in certain circumstances, 15 U.S.C. 1692f(6)), the FDCPA defines "debt collector" "also" to include an entity that engages in "any business the principal purpose of which is the enforcement of security interests." 15 U.S.C. 1692a(6).

2. This case concerns the actions of a law firm in initiating a non-judicial foreclosure on a deed of trust securing a debt under Colorado law.

The remedy of foreclosure has a long history in Anglo-American law. Originally, if a debtor failed to make a payment on the exact date it was due, a creditor holding a mortgage simply received the property that secured the debt. See 4 *Powell on Real Property* § 37.36 (Michael Allan Wolf ed. 2018). To mitigate the harshness of that rule, English courts developed an "equity of redemption": *i.e.*, an "equitable right of a borrower to buy back, or redeem, property conveyed as security" by paying the debt after the due date. *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 541 (1994). Because that right was indefinite, however, "title to forfeited property could remain clouded for years" after the default. *Ibid.* In response, courts created the additional equitable remedy of foreclosure, enabling a creditor "forever [to] foreclose[]" the debtor from "exercising his equity of redemption." *Ibid.*

At issue in this case is a foreclosure with limited judicial involvement, known as a "non-judicial foreclosure." Thirty-three States and the District of Columbia permit non-judicial foreclosures. Those state-law schemes are broadly similar, requiring public notice of the foreclosure sale and preventing a creditor from obtaining a deficiency judgment against the debtor within the non-judicial foreclosure process. See 1 Grant S. Nelson et al., *Real Estate Finance Law* § 7:20, at 944 & n.1 (6th ed. 2014); 4 *Powell on Real Property* § 37.42[1], [4]-[6].

The non-judicial foreclosure at issue in this case was initiated under a deed of trust under Colorado law. A deed of trust is a security instrument that preauthorizes the sale of a property in the event of default. See Colo. Rev. Stat. § 38-38-100.3(7); Colo. R. Civ. P. 120(a). A creditor holding a debt secured by a deed of trust has, first, "a

right *in personam* against the debtor" that "can be collected out of a debtor's general assets," and second, "a specific claim *in rem* against the particular property constituting the security." Frederic P. Storke & Don W. Sears, *Enforcement of Security Interests in Colorado*, 25 Rocky Mtn. L. Rev. 1, 1 (1952) (Storke & Sears). Upon default, therefore, the secured creditor has a right "different and separate from the mere right to be paid": it may foreclose on the lien of the deed of trust, rather than (or in addition to) suing on the debt itself. *Folda Real Estate Co.* v. *Jacobsen*, 223 Pac. 748, 748 (Colo. 1924); see *Foothills Holding Corp.* v. *Tulsa Rig, Reel & Manufacturing Co.*, 393 P.2d 749, 751 (Colo. 1964); Storke & Sears 1.

Colorado law sets out a detailed framework for non-judicial foreclosure. See Colo. Rev. Stat. §§ 38-38-100.3 to 38-38-114; Colo. R. Civ. P. 120. Unlike most other States that permit non-judicial foreclosure, Colorado relies on a public trustee, an impartial elected or appointed official, throughout the non-judicial foreclosure process. See Colo. Rev. Stat. §§ 38-37-102, 38-38-101, 38-39-101. The public trustee "ensure[s] the protection of debtors while maintaining a speedy, efficient procedure for creditors." *Plymouth Capital Co.* v. *District Court*, 955 P.2d 1014, 1015 (Colo. 1998); see Storke & Sears 20.

Colorado law specifies various notices the creditor or its attorney must provide to the debtor in order to pursue a non-judicial foreclosure. At least thirty days before initiating the non-judicial foreclosure process, a creditor must send a notice to the debtor containing, *inter alia*, information about the Colorado foreclosure hotline and the creditor's loss-mitigation representative. See Colo. Rev. Stat. § 38-38-102.5(2). A creditor must then file a "notice of election and demand" with the public trustee; with that notice, the creditor must provide evidence of the debt's validity as well as other documentation. *Id.* § 38-38-

101(1), (4). The public trustee then reviews the filing and, if the filing is complete, records the notice, thereby officially commencing the foreclosure process. See *id.* § 38-38-102(1); *Land Title Insurance Corp.* v. *Ameriquest Mortgage Co.*, 207 P.3d 141, 143 n.6 (Colo. 2009).

Although judicial involvement in a non-judicial foreclosure is limited, Colorado law does require the creditor to obtain an order from a state court establishing a "reasonable probability that a default justifying the sale has occurred." Colo. R. Civ. P. 120; see Colo. Rev. Stat. § 38-38-105. That allows a court to address "issues related specifically to the existence of a default." *Plymouth Capital*, 955 P.2d at 1016. At that stage of the process, the debtor is entitled to direct notice, even if he is represented by counsel, as are other parties that may have acquired an interest in the property. The debtor is also afforded an opportunity to object to the sale: for instance, because the foreclosing entity has no right to foreclose or no default has actually occurred. See Colo. R. Civ. P. 120(a)-(d).

In addition to the notices required for the hearing, the public trustee is required to mail the debtor and certain other parties a combined notice that identifies the date of sale and informs the debtor of the right to cure the default and reinstate the loan before the sale. See Colo. Rev. Stat. §§ 38-38-103, 38-38-104. The combined notice must also be published weekly in a newspaper for at least four weeks. See *id.* § 38-38-103(5)(a).

The public trustee must schedule an initial sale date within 125 days of the recording of the notice of election and demand. See Colo. Rev. Stat. § 38-38-108(1)(a). At least two days before the sale, the creditor must submit an initial bid to the public trustee, up to the amount owed on the debt. See *id.* § 38-38-106(1), (6). The public trustee must advertise the initial bid to the general public and then conduct the sale. See *id.* §§ 38-38-106(3), 38-38-110.

The creditor and other parties may attend the sale and submit bids in excess of the initial bid. See *id.* § 38-38-106(7). All funds from the sale are paid to the public trustee. See *id.* § 38-37-108.

If the property sells for less than the amount owed on the debt, the creditor may not seek to collect any deficiency from the debtor as part of the non-judicial foreclosure process; in order to seek to recover that amount, the creditor must file a separate judicial action. See Colo. Rev. Stat. § 38-38-106(6); *Bank of America* v. *Kosovich*, 878 P.2d 65, 66 (Colo. App. 1994); Storke & Sears 4. If the property sells for more than the amount owed, the excess funds are retained and then paid in order of priority to any junior lienholders. Any remaining funds are paid into escrow and, if the debtor fails to claim them, released to the county or transferred to the state treasurer. See Colo. Rev. Stat. § 38-38-111.

B. Facts And Procedural History

1. In 2007, petitioner obtained a loan to buy a residential property in Bailey, Colorado. The loan was secured by the property and serviced by Wells Fargo Bank, N.A. Petitioner defaulted on the loan in 2009 and stopped making payments in 2011. Between 2008 and 2012, Wells Fargo repeatedly worked with petitioner to obtain payment on the loan, offering multiple loan modifications. Wells Fargo also initiated, but then withdrew, multiple foreclosures. Pet. App. 2a, 15a.

In 2014, Wells Fargo hired respondent, a law firm, to pursue a non-judicial foreclosure under Colorado law. Petitioner's allegations against respondent focus on a letter that it sent him stating that it had been "instructed to commence foreclosure against the * * * property." The letter contained a series of disclaimers, including one informing petitioner that respondent "may be considered

a debt collector attempting to collect a debt." The letter further stated the amount petitioner owed to the creditor; noted that respondent would assume the debt to be valid unless petitioner disputed it within thirty days; and warned that foreclosure could be commenced before the end of that period. J.A. 37-38; Pet. App. 15a-16a.

Petitioner alleged that he responded to the letter, asking for verification of the debt, but that he did not receive any response. On appeal, however, petitioner produced for the first time a letter from respondent dated August 4, 2015, that provided verification of the debt. J.A. 23, 46-47; Pet. App. 2a & n.1.

In May 2015, respondent took steps to initiate a non-judicial foreclosure under Colorado law by filing a notice of election and demand for sale with the public trustee. Shortly thereafter, petitioner filed a complaint with the Bureau of Consumer Financial Protection alleging that respondent had not responded to his verification request. To date, the sale of the property has not occurred. J.A. 39-41; Pet. App. 2a, 16a.[1]

2. On August 12, 2015, petitioner filed suit against respondent and Wells Fargo (as well as other improperly named entities) in the United States District Court for the District of Colorado, asserting various claims under the FDCPA and Colorado state law. Pet. App. 2a-3a, 16a. The only live claim in this case is petitioner's FDCPA

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[1] Petitioner has since filed for bankruptcy. In his Chapter 13 bankruptcy plan, petitioner proposes "surrender[ing]" the property without paying the creditor—thus accomplishing the same substantive result sought by the non-judicial foreclosure at issue here. See Dkt. 2, at 6, 8, *In re Obduskey*, No. 18-18627 (Bankr. D. Colo. Oct. 2, 2018).

claim against respondent. See Pet. Br. 7.[2] In that claim, petitioner alleges that respondent engaged in prohibited debt-collection activity by failing to provide verification of the debt before initiating the non-judicial foreclosure. Pet. App. 16a; J.A. 23.

As is relevant here, respondent moved to dismiss the complaint, and the district court granted the motion. Pet. App. 14a-32a. The district court held that respondent's activities were not covered by the FDCPA because the complaint "d[id] not allege that [respondent] took any action to obtain payment on a debt." *Id.* at 20a. The court rejected the contention that the foreclosure process could itself constitute the "collection of a debt." *Id.* at 21a. The court added that the disclaimer in respondent's letter stating that it might be considered a debt collector was "insufficient to state an FDCPA claim." *Ibid.*

3. The court of appeals affirmed, holding that respondent was not engaged in debt collection under the FDCPA. Pet. App. 1a-13a.

While noting that petitioner's complaint was "far from perfect," the court of appeals determined that petitioner had sufficiently pleaded that respondent "failed to verify [petitioner's] debt after it was disputed, in violation of [Section] 1692g." Pet. App. 5a. The court of appeals then proceeded to consider whether respondent qualified as a "debt collector" engaged in "debt collection," noting that

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[2] Petitioner's FDCPA claim against Wells Fargo was dismissed (and the dismissal affirmed) on the ground that Wells Fargo was entitled to invoke a statutory exclusion for persons who obtained debt before default. Pet. App. 4a-5a, 18a-20a; see 15 U.S.C. 1692a(6)(F). Petitioner did not seek review from this Court concerning that claim, and the judgment in favor of Wells Fargo is therefore final regardless of this Court's resolution of the question presented. See Pet. Br. 8 n.3.

the court had not previously addressed that question in the context of non-judicial foreclosure. *Id.* at 5a-6a, 12a.

The court of appeals explained that, under the FDCPA's "plain language," an entity qualifies as a debt collector when it is attempting to collect money from a debtor. Pet. App. 7a. Merely enforcing a security interest, the court continued, is not inherently an attempt to collect money; to the contrary, a consumer has no obligation to pay any money in a non-judicial foreclosure. *Ibid.* The court deemed persuasive the Ninth Circuit's reasoning in its recent decision in *Ho* v. *ReconTrust Co., N.A.*, 858 F.3d 568, cert. denied, 138 S. Ct. 504 (2017), which held that initiating a non-judicial foreclosure without seeking payment does not render an entity a "debt collector" for purposes of the FDCPA. Pet. App. 7a.

The court of appeals declined to follow sweeping language in a Sixth Circuit decision asserting that "*every* mortgage foreclosure, judicial or otherwise," triggers application of the FDCPA. Pet. App. 8a (quoting *Glazer* v. *Chase Home Finance LLC*, 704 F.3d 453, 461 (2013)). According to the court of appeals, while judicial foreclosure activity (the type of foreclosure at issue in the Sixth Circuit decision) "may" be covered by the FDCPA, non-judicial foreclosure is different in an "obvious and critical" respect, because a trustee has no right to "collect any deficiency in the loan amount personally against the mortgagor" through the non-judicial foreclosure process. *Id.* at 8a-9a (citation omitted).

The court of appeals reasoned that the distinction between judicial and non-judicial foreclosures is significant under Colorado law, which requires a creditor that carries out a non-judicial foreclosure to collect any deficiency in a separate action. Pet. App. 8a. Because a non-judicial foreclosure would allow the public trustee only to "obtain proceeds from the sale of the foreclosed property, and no

more," the court determined that respondent's letter notifying petitioner that it would initiate a non-judicial foreclosure did not constitute an attempt to seek the payment of money from petitioner. *Id.* at 9a (citation omitted).

In making that determination, the court of appeals emphasized that the FDCPA might apply if respondent had "demand[ed] payment" or "attempted to induce [payment] by threatening foreclosure." Pet. App. 9a, 12a. Here, however, petitioner did not allege that respondent had done either; instead, he alleged simply that respondent had "sent * * * one letter notifying [him] that it was hired to commence foreclosure" against the property. *Id.* at 12a.

The court of appeals observed that a contrary holding would create a conflict between the FDCPA and Colorado law. Pet. App. 10a. As the court noted, Colorado law requires that notice be provided directly to a debtor (such as petitioner) who is represented by counsel, as well as to any interested third parties, in advance of a non-judicial foreclosure sale, whereas the FDCPA forbids such communications. *Id.* at 10a-11a. The court reasoned that Congress did not express a "clear and manifest" intention to supplant state law in an area of traditional state regulation, especially given that Colorado's provisions are designed to "*protect* the consumer." *Id.* at 11a (citation omitted). The court thus concluded that the "mere act of enforcing a security interest through a non-judicial foreclosure" under Colorado law does not constitute debt collection within the meaning of the FDCPA. *Id.* at 12a.

The court of appeals made clear that it was not addressing whether "more aggressive collection efforts," such as "leveraging the threat of foreclosure into the payment of money," would qualify as "debt collection" under

the FDCPA. Pet. App. 12a. The court added that petitioner was still free to contest the non-judicial foreclosure in a proceeding under Colorado law. *Ibid.*

SUMMARY OF ARGUMENT

The court of appeals correctly held that merely enforcing a security interest by initiating a non-judicial foreclosure under Colorado law, without attempting to obtain money from the debtor, does not constitute debt collection under the FDCPA. Its judgment should be affirmed.

A. 1. The FDCPA defines a "debt" as a consumer's obligation to pay money. And the ordinary meaning of the word "collect" (not itself defined in the FDCPA) is to demand and obtain payment. Debt collection, then, is the process of demanding or obtaining payment from the debtor. A non-judicial foreclosure is plainly not that: a party initiating a non-judicial foreclosure seeks not to collect money from the debtor, but rather to cut off the debtor's ability to make payments, enabling the creditor to realize its security interest as an alternative remedy.

The FDCPA's definition of "debt collector" strongly confirms that conclusion. That definition distinguishes between entities that engage in the collection of debts, which are "debt collectors" subject to the entire FDCPA, and entities that engage in the enforcement of security interests, which are "debt collectors" only for purposes of a specific prohibition not at issue here. The distinction Congress drew between those entities makes sense only if enforcing security interests does not itself constitute debt collection. Treating the enforcement of a security interest as debt collection would read out of the statute the limited-purpose definition related to the enforcement of security interests, thus violating a fundamental tenet of statutory interpretation.

Congress's distinction between the collection of a debt and the enforcement of a security interest tracks a well-established dichotomy at common law. Courts have long recognized that *in rem* actions seeking to enforce liens are distinct from *in personam* actions seeking to recover debts. There is no reason to believe that Congress intended for the FDCPA to erode that distinction.

2. Consistent with the foregoing interpretation, the Federal Trade Commission (FTC) has interpreted the FDCPA not to reach the enforcement of a security interest, including non-judicial foreclosure. The FTC has explained that entities that enforce security interests are not generally subject to the FDCPA, and it has issued an opinion letter explaining that sending notices in connection with effecting a non-judicial foreclosure does not constitute debt collection.

B. The FDCPA's legislative history confirms the plain-text interpretation. In the run-up to the enactment of the FDCPA, Congress considered competing bills. One included in the general definition of "debt collector" not only entities that engage in debt collection but also those that enforce security interests. Another excluded from the definition entities that enforce security interests. Congress struck a compromise by including entities that enforce security interests only in the limited-purpose definition. Treating the enforcement of a security interest as debt collection would undo that compromise, judicially enacting language that Congress itself chose to reject.

C. Petitioner makes several arguments in support of his sweeping contention that initiating a foreclosure constitutes debt collection. None is persuasive.

1. Petitioner argues that, as a practical matter, initiating a foreclosure has the intent and effect of inducing payment. That ignores the history and purpose of the foreclosure remedy, which operates to end a debtor's

right to cure the default and thereby allows the creditor to obtain compensation by enforcing its security interest *rather than* by obtaining payment on the debt. A creditor may prefer such an alternative remedy where, as here, the debtor has shown an unwillingness to make payments for an extended period. It is especially clear here that respondent sought to initiate foreclosure rather than to obtain payment, because respondent never asked petitioner to pay—an inexplicable omission for an entity looking to obtain payment from the debtor in lieu of foreclosure.

2. Petitioner also contends that initiating a non-judicial foreclosure constitutes "indirect" debt collection. But initiating a non-judicial foreclosure differs from actions antecedent to seeking payment from a debtor, such as obtaining the debtor's contact information. An entity that initiates a non-judicial foreclosure does not thereby seek payment from the debtor, whether directly or indirectly.

In arguing to the contrary, petitioner relies on a portion of a dictionary definition this Court previously cited, which defines debt collection as obtaining payment or liquidation of the debt, either by personal solicitation or legal proceedings. But petitioner quotes only a snippet of that definition, and he takes it out of context; in fact, the Court used the definition to support its interpretation of debt collection as obtaining payment of money from the debtor. A non-judicial foreclosure does not satisfy that definition. Petitioner suggests that foreclosure liquidates a debt, but he improperly conflates liquidating an *asset* (*i.e.*, the secured property) with liquidating the *debt* itself. And he omits entirely the requirement that the payment or liquidation occur either by personal solicitation or legal proceedings—something that plainly does not happen in a non-judicial foreclosure.

3. In an effort to avoid the serious superfluity problem his interpretation creates, petitioner suggests that

the limited-purpose definition of "debt collector," which applies to "enforcement of security interests," covers only repossession activity. That argument is entirely atextual; by its terms, the limited-purpose definition reaches *all* enforcement of security interests. In any event, that argument cannot help petitioner; on his view of debt collection, repossession activity would also qualify, leaving the limited-purpose definition superfluous.

D. For the reasons just stated, petitioner's interpretation is precluded by the plain text of the FDCPA. But even if the FDCPA were ambiguous, petitioner's interpretation should be rejected, because construing the FDCPA to reach foreclosure activities would interfere with a core area of state regulation. This Court has recognized that regulating non-judicial foreclosure implicates States' essential sovereign interest in protecting titles to property. Accordingly, the Court has refused to interpret federal law to interfere with state foreclosure law absent clear and manifest congressional intent.

The same principle applies here. The FDCPA's provisions are tailored to practices that demand payment of money by debtors, not to foreclosure activities. Applying the FDCPA would seriously interfere with complex state foreclosure regimes. And it would undermine, rather than bolster, protections afforded to debtors under those regimes. In fact, applying the FDCPA would create an outright conflict with (and thus preempt) numerous state-law provisions, which in many instances are critical to their respective States' foreclosure regimes. The Court should not disrupt the balance of federal and state authority in an area of traditional state concern where Congress has not made clear its intent to do so.

In short, all of the relevant indicia of statutory interpretation point in the same direction in this case. The judgment of the court of appeals should be affirmed.

ARGUMENT

ENFORCING A SECURITY INTEREST BY INITIATING A NON-JUDICIAL FORECLOSURE DOES NOT CONSTITUTE DEBT COLLECTION UNDER THE FAIR DEBT COLLECTION PRACTICES ACT

A. Under The Plain Text Of The FDCPA, Enforcing A Security Interest Is Not Debt Collection

Petitioner has alleged that respondent was a "debt collector" under the FDCPA, obligated to "cease collection of the debt" after receiving petitioner's request for verification until it provided the verification. 15 U.S.C. 1692g(b). To prevail on that claim, petitioner must establish that respondent was a *debt collector* at the time of petitioner's request for verification, which was shortly after respondent sent petitioner a notice that it was initiating a non-judicial foreclosure. In addition, petitioner must establish that respondent engaged in *debt collection* after receiving petitioner's verification request (namely, by filing a notice of election and demand for sale with the public trustee). See 15 U.S.C. 1692g(a), (b); J.A. 23, 37-41. The question in this case is thus whether initiating a non-judicial foreclosure, without more, constitutes collection of a debt and renders an entity a "debt collector." As the plain text of the FDCPA makes clear, the answer to that question is no.

1. The FDCPA defines "debt" as an "obligation or alleged obligation of a consumer to pay money." 15 U.S.C. 1692a(5). "Collect," in turn, is not defined in the statute, but its natural meaning is to "demand and obtain payment." See, *e.g.*, *Webster's Second New International Dictionary* 525 (1959) ("[t]o demand and obtain payment of, as an account, or other indebtedness"); *American Heritage Dictionary* 261 (1976) ("[t]o call for and obtain payment of"); *Random House Dictionary* 289 (1971) ("to receive or compel payment of"); see also *Webster's Second*

New International Dictionary 525 (defining "collection" as "the [a]ct or process of collecting"). Putting those definitions together, collecting a debt means demanding or obtaining a payment of money from the debtor.

Under that understanding, engaging in a non-judicial foreclosure does not constitute debt collection. A party initiating a non-judicial foreclosure does not seek any payment from the debtor. Instead, it seeks to *end* a debtor's ability to make payments, allowing the creditor to make full use of the secured property. See p. 4, *supra*. In a non-judicial foreclosure, one third party (a trustee) sells property to another third party (the purchaser), or even to the creditor itself. Any funds generated at that sale provide the creditor with an *alternative* to seeking payment from the debtor. At no point during the foreclosure process is the debtor required to pay money. Indeed, the foreclosure regime at issue here provides no mechanism for a creditor to obtain payment, because Colorado (like other States) does not allow a creditor to collect a deficiency through the non-judicial foreclosure process. See p. 7, *supra*; 4 *Powell on Real Property* § 37.42[6].

2. Reinforcing and confirming that understanding, the FDCPA itself distinguishes the enforcement of security interests from the collection of debts.

a. Section 1692a(6) defines a "debt collector" as an entity that "regularly collects or attempts to collect, directly or indirectly," debts owed to another or an entity whose "principal purpose * * * is the collection of any debts." 15 U.S.C. 1692a(6). Critically, Section 1692a(6) then provides that, "*[f]or the purpose of* section 1692f(6)"—a provision not at issue here—the phrase "debt collector" "*also* includes" entities whose principal purpose is the "enforcement of security interests." *Ibid.* (emphases added). In setting forth those definitions, the FDCPA thus distinguishes between "the collection of any

debts" and "the enforcement of security interests": a business whose primary purpose is the former is a debt collector for purposes of the entire FDCPA, whereas a business whose primary purpose is the latter qualifies as a debt collector only for the limited purpose of Section 1692f(6). See *ibid.*

The limited-purpose definition makes clear that the enforcement of a security interest does not itself constitute debt collection. A definition that "also includes" a particular meaning "for the purpose" of a specified subsection conveys that the particular meaning does not apply for other purposes. Indeed, Congress routinely uses the same formulation to convey that very point. See, *e.g.*, 37 U.S.C. 305a(e)(1)(B), (e)(3) (stating that, "[f]or the purpose of" a specific determination, "the term 'sea duty' also includes" certain service carried out on a ship in its home port, while the general definition applies only when the ship is away from its port); 38 U.S.C. 101(2), 3701(b)(6) (providing that "[t]he term 'veteran' also includes," "for [specific] purposes," a "surviving spouse," even though qualifying as a "veteran" normally requires active service); 38 U.S.C. 3701(b)(3) (similar).

That understanding also accords with ordinary usage. Consider, for example, the following statement: "The phrase 'voting members of Congress' means all United States Senators; for purposes of breaking a tie in the Senate, the phrase also includes the Vice President of the United States." Such a statement clearly communicates that the Vice President is not a voting member of Congress for other purposes.[3]

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[3] The second sentence of Section 1692a(6) offers further support. It states that, under the FDCPA, "the term ['debt collector'] includes" creditors using a third party's name, "[n]otwithstanding" a later exclusion. Congress omitted the word "also" and the phrase

Accordingly, enforcing a security interest does not generally constitute debt collection, and it renders an entity a "debt collector" only for a limited purpose. That is dispositive here: there can be no doubt that initiating a foreclosure is a paradigmatic way to enforce a security interest. See, *e.g.*, Uniform Commercial Code § 9-501(1) (1972) (allowing a creditor to "foreclose or *otherwise enforce* the security interest by any available judicial procedure" (emphasis added)). Petitioner does not dispute that all of respondent's challenged actions were part of the process of enforcing its client's security interest. See Pet. Br. 2, 12-13.

If enforcing a security interest were sufficient to constitute debt collection, a business that primarily enforces security interests would be a debt collector under the general-purpose definition and thus subject to the entire FDCPA (including Section 1692f(6)). That would read the limited-purpose definition out of the statute, in contravention of the familiar principle of statutory interpretation that a statute should be construed to avoid superfluity. See, *e.g.*, *United States* v. *Jicarilla Apache Nation*, 564 U.S. 162, 185 (2011); see generally Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174-176 (2012) (Scalia & Garner).

The Court has applied that principle to reject interpretations that, as here, would render a definition meaningless. For example, in *Roberts* v. *Sea-Land Services*, 566 U.S. 93 (2012), the Court rejected an interpretation of the word "award" which would render "unnecessary" a

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"[f]or the purpose of" from that sentence. As a result, that sentence clarifies the general definition of "debt collector," rather than expanding it for a limited purpose. See *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 452 (2002); cf. *Mount Lemmon Fire District* v. *Guido*, No. 17-587, slip op. 4-5 (Nov. 6, 2018).

"specific definition" that applied "[f]or the purpose" of another subsection. *Id.* at 110 (citation omitted). Because such an interpretation would "offend[] the canon against superfluity," the Court reasoned, the presence of the limited-purpose definition "debunk[ed]" that interpretation. *Id.* at 111. Similarly, where Congress listed "separate[ly]" in a statutory provision a "crime of violence" and the crime of driving while intoxicated, the Court rejected an interpretation of the former which would encompass the latter. *Leocal* v. *Ashcroft*, 543 U.S. 1, 12 (2004). Such an interpretation, the Court explained, would leave the separate listing of the two crimes "practically devoid of significance." *Id.* at 11-12.

The reasoning of those cases applies with particular force here, because the general and limited-purpose definitions of "debt collector" are in close proximity to each other. No inferential step is required to connect the two definitions, nor is there any possibility that Congress simply overlooked one provision in crafting the other: in fact, in setting out the limited-purpose definition of "debt collector," Congress expressly referred back to the general definition, using the phrase "such term." See 15 U.S.C. 1692a(6); cf. *Roberts*, 566 U.S. at 110-111; *Jicarilla Apache Nation*, 564 U.S. at 185-186.

In short, interpreting debt collection to encompass the enforcement of a security interest would impermissibly vitiate "Congress's specification of narrowly defined * * * obligations" for entities that engage in the enforcement of security interests. *Jicarilla Apache Nation*, 564 U.S. at 186. Recognizing that enforcing a security interest does not constitute debt collection, by contrast, "give[s] * * * effect to every clause and word of [the] statute." *Roberts*, 566 U.S. at 111 (citation omitted); see *Bailey* v. *United States*, 516 U.S. 137, 146 (1995).

b. In distinguishing between the enforcement of security interests and the collection of debts, Congress incorporated a distinction deeply ingrained at common law. "It is a settled principle of interpretation that, absent other indication, Congress intends to incorporate the well-settled meaning of the common-law terms it uses." *Sekhar* v. *United States*, 570 U.S. 729, 732 (2013) (internal quotation marks and citation omitted).

At common law, courts recognized that a judicial foreclosure is an action to "enforce the lien" that secures the debt, not an action for "recovery of the sum secured." *Ozmun* v. *Reynolds*, 11 Minn. 459, 472 (1866). As a result, enforcing a lien was permitted even where "action for the recovery of the debt [wa]s barred." *Ibid.*; see *Thayer* v. *Mann*, 36 Pick. (Mass.) 535, 537 (1837); see generally Walter Wheeler Cook, *The Powers of Courts of Equity, Part II*, 15 Colum. L. Rev. 106, 133-134 (1915) (Cook). Similarly, actions to recover debts were "personal" (*in personam*) actions at common law, as distinct from "real" (*in rem* or *quasi in rem*) actions concerning the title of real property, or "mixed" actions concerning both title and a demand for payment. 3 William Blackstone, *Commentaries on the Laws of England* 117-118 (1768); see, *e.g.*, *Freeman* v. *Alderson*, 119 U.S. 185, 187-188 (1886); *Sumers* v. *Board of Commissioners of Garfield County*, 184 P.2d 144, 147 (Colo. 1947) (per curiam); see generally Cook 136 n.73.[4]

3. Other textual cues further support the conclusion that enforcement of security interests is distinct from

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[4] Chapter 7 of the Bankruptcy Code reflects the same distinction: the discharge of debts "extinguishes" only a "debtor's *in personam* liability," while "leaving intact" the creditor's *in rem* "right to foreclose on [a] mortgage." *Johnson* v. *Home State Bank*, 501 U.S. 78, 82-84 (1991); see *Dewsnup* v. *Timm*, 502 U.S. 410, 418 (1992).

debt collection. *First*, the FDCPA repeatedly refers to the "collection" of debts, but refers only to the "enforcement" of security interests. See, *e.g.*, 15 U.S.C. 1692a(6). The use of different verbs underscores that Congress understood the collection of debts and the enforcement of security interests to be distinct concepts. Compare *Webster's Second New International Dictionary* 525 (defining "collect" as "[t]o demand and obtain payment") with *Black's Law Dictionary* 645 (10th ed. 2014) (defining "enforce" as "[t]o give force or effect to").[5]

Second, the FDCPA's substantive provisions support the foregoing understanding of debt collection. Most of the examples of "unfair" debt-collection practices identified in the FDCPA involve ways of obtaining or demanding payment of money. See 15 U.S.C. 1692f(1)-(4) (prohibiting unauthorized "collection of any amount" and addressing payment by postdated check). The others limit methods of communicating with the debtor—a significant step in soliciting the payment of money. See 15 U.S.C. 1692f(5), (7)-(8). Indeed, the sole listed practice that does not primarily relate to obtaining payment of money is Section 1692f(6), which limits certain non-judicial actions to effect dispossession of property. Tellingly, that is the one prohibition to which the limited-purpose definition applies. See 15 U.S.C. 1692a(6).

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[5] Drawing a similar distinction, the Federal Debt Collection Procedures Act, which regulates the federal government's efforts to collect debts, makes clear that it does not "curtail or limit the right[s]" of the government "to enforce a security agreement." 28 U.S.C. 3003(b). And the Single Family Mortgage Foreclosure Act and the Multifamily Mortgage Foreclosure Act both permit the government to carry out non-judicial foreclosures on mortgages it holds as creditor, while making clear that such foreclosures are distinct from "right[s] to obtain a monetary judgment." 12 U.S.C. 3705, 3755(b)(1); see 12 U.S.C. 3768(a)(1) (providing for a referral to the Attorney General for a separate action against a debtor to recover a deficiency).

4. The foregoing interpretation is consistent with positions taken previously by government components. The Federal Trade Commission (FTC) has interpreted the FDCPA's general definition of "debt collector" to exclude the enforcement of security interests. In 1988, the FTC issued formal staff commentary to "clarify and codify" its interpretation of the FDCPA. 53 Fed. Reg. 50,097 (Dec. 13, 1988). In addressing "[s]ecurity enforcers," the FTC set forth the interpretation of the statute's limited-purpose definition of "debt collector" that is discussed above. The agency explained that, "[b]ecause the FDCPA's definition of 'debt collection' includes parties whose principal business is enforcing security interests only for [S]ection [1692f(6)] purposes, such parties (if they do not otherwise fall within the definition) are subject only to this provision and not the rest of the FDCPA." *Id.* at 50,108.[6]

The FTC later specifically addressed the question presented here in response to an inquiry from an attorney engaged in initiating non-judicial foreclosures. The FTC assured the attorney that, even assuming he was a debt collector by virtue of his other activities, sending non-judicial foreclosure notices was outside the scope of the FDCPA. See Federal Trade Commission, Staff Opinion Letter, 1992 WL 12622329, at *2-*4 (Oct. 8, 1992) (Staff Opinion Letter).

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[6] The Bureau of Consumer Financial Protection has also embraced that framework. In 2012, it issued a regulation defining "larger participants" in the "consumer debt collection market" to delineate the scope of the Bureau's supervisory authority under the Dodd-Frank Act. See 77 Fed. Reg. 65,775, 65,776 (Oct. 31, 2012). The definitions in that regulation specify that the phrase "debt collector" does not include "[a]ny person engaged solely in enforcing a security interest." 12 C.F.R. 1090.105(a); see 77 Fed. Reg. 65,781.

In its opinion letter, the FTC advised that the FDCPA—specifically, Section 1692g, the very substantive provision at issue in this case—"does not apply" to "a notice sent by an attorney [debt] collector in connection with a non-judicial foreclosure" that "is required by [state] statute as a condition precedent to the enforcement of a contractual obligation between a creditor and a debtor, whether by judicial or non-judicial process." 1992 WL 12622329, at *3. The FTC further advised that the attorney's actions in the course of non-judicial foreclosure would constitute debt collection if the attorney sent a letter "making demand[s] for payment and asserting that certain actions will be taken absent payment," but even then, only if those demands "[we]re not required by [the] state statute." *Ibid.* While not binding on the FTC, that analysis reflected the FTC staff's "enforcement position." *Id.* at *4.

The FTC's interpretation further demonstrates that the enforcement of security interests and the collection of debts are distinct concepts and that initiating a non-judicial foreclosure, without more, does not constitute debt collection under the FDCPA.

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In light of the foregoing interpretation, respondent was not a debt collector simply because it notified petitioner that it would initiate a non-judicial foreclosure. See 15 U.S.C. 1692a(6); J.A. 37-38. And regardless whether respondent was a debt collector, it did not engage in debt collection after receiving a verification request by virtue of filing a notice of election and demand with the public trustee to initiate the non-judicial foreclosure process. See 15 U.S.C. 1692g(b); J.A. 39-41. Petitioner's claim fails for both of those (closely related) reasons.

B. The FDCPA's Legislative History Confirms That Enforcing A Security Interest By Initiating A Non-Judicial Foreclosure Is Not Debt Collection

The FDCPA's legislative history supports the plain-text interpretation of the statute, showing that Congress treated the enforcement of security interests as distinct from the collection of debts. Indeed, Congress considered, and rejected, language that would have made enforcers of security interests "debt collectors" for all purposes under the FDCPA.

The limited-purpose definition in Section 1692a(6) was drafted by the Senate Banking Committee, which considered competing draft bills. One bill brought entities whose principal purpose was enforcing security interests within the full scope of the FDCPA, defining the phrase "debt collector" as "any person who engages in any business the principal purpose of which is the collection of any debt *or enforcement of security interests*." S. 918, 95th Cong. § 803(f) (1977) (emphasis added). Another bill, by contrast, wholly excluded from the definition of "debt collector" any person "who enforces or attempts to enforce a security interest in real or personal property which is valid under State law." S. 1130, 95th Cong. § 802(8)(E) (1977).[7]

Congress ultimately passed a "composite bill," striking a compromise between those approaches. In that bill,

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[7] Unsurprisingly, interested parties understood the competing definitions as addressing the treatment of foreclosure activities. See *Hearings Before the Subcomm. on Consumer Affairs of the Comm. on Banking, Housing, and Urban Affairs, on S. 656, S. 918, S. 1130, and H.R. 5294: Bills to Amend the Consumer Credit Protection Act to Prohibit Abusive Practices by Debt Collectors*, 95th Cong. 247 (1977) (statement of Lewis H. Goldfarb, FTC Acting Assistant Director for Special Statutes) (describing the exemption for entities enforcing a security interest as an exemption for "parties engaged in repossession *or foreclosure*") (emphasis added)).

Congress included enforcers of security interests as debt collectors only for the limited purpose of Section 1692f(6). See S. Rep. No. 382, 95th Cong., 1st Sess. 1 (1977); *Markup on Debt Collection Legislation Before the S. Comm. on Banking, Housing and Urban Affairs*, 95th Cong. 3-4 (June 30, 1977) (statement of Sen. Riegle) (introducing the new draft of the FDCPA as "consensus legislation" that is "the best blend of opinion that we have been able to formulate from talking and working with all the interested parties").

Petitioner's interpretation would effectively reinstate the rejected language of the earlier Senate bill by treating the enforcement of security interests as debt collection for all purposes. As this Court has stated, however, "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987) (citation omitted); see *Chickasaw Nation* v. *United States*, 534 U.S. 84, 93 (2001). That principle is "particularly appropriate" here because the FDCPA "is the result of a series of carefully crafted compromises." *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 748 n.14 (1989).

Another portion of the legislative history further illustrates that Congress did not intend to regulate foreclosure. Both the House and Senate Reports asserted that the FDCPA was needed in part because "there are 13 States, with 40 million citizens, that have no debt collection laws." S. Rep. No. 382, *supra*, at 2; see H.R. Rep. No. 131, 95th Cong., 1st Sess. 3 (1977). But then, as now, *every* State had laws governing foreclosures. See George E. Osborne, *Handbook on the Law of Mortgages* 662-663 (2d ed. 1970); William C. Prather, *Foreclosure of the Security Interest*, 1957 U. Ill. L.F. 420, 450-451 (1957). Congress's

statement that thirteen States did not regulate debt-collection practices suggests both that Congress did not view foreclosure as debt collection and that Congress was motivated by specific deficiencies in state debt-collection laws that had nothing to do with foreclosure.

In sum, Congress considered, and rejected, a definition of "debt collector" that would include entities enforcing security interests within the FDCPA for all purposes. This Court should reject an interpretation of the FDCPA that would resurrect discarded statutory language and thereby undo the compromise Congress struck.

C. Petitioner's Alternative Interpretation Is Contrary To The Plain Text Of The FDCPA

Petitioner makes several arguments in support of his contention that engaging in foreclosure activity constitutes debt collection. See Br. 14-28. None is correct.

1. Petitioner first argues (Br. 14-19) that enforcing a security interest by initiating a non-judicial foreclosure constitutes a "direct" attempt to collect a debt because it seeks money from the debtor.

a. Invoking the "reality" of foreclosure (Br. 16), petitioner suggests that initiating a foreclosure has the intent and effect of inducing payment. But petitioner ignores the fact that enforcement of a security interest is a separate remedy available to a creditor as an *alternative* to collecting payment from the debtor. See pp. 4-5, 17, *supra*. The foreclosure remedy allows a creditor to cut off the debtor's ability to reclaim title in the secured property by making payments. See p. 4, 17, *supra*. And while a debtor might choose to make payments to avoid foreclosure, that is only because state law gives a debtor the right to make payments (and to receive notice of that right) for the debtor's own protection. See, *e.g.*, *Kirchner* v. *Sanchez*, 661 P.2d 1161, 1163 (Colo. 1983).

In many cases, obtaining a lump sum from a foreclosure sale in lieu of continuing to seek payment from the debtor will be a creditor's best option after assessing various factors, including the debtor's financial circumstances; the debtor's history with the creditor; the creditor's liquidity; the relevant housing market; and the financing arrangement. See Lydia Nussbaum, *ADR's Place in Foreclosure: Remedying the Flaws of a Securitized Housing Market*, 34 Cardozo L. Rev. 1889, 1893, 1896 (2013). That was plainly the case here: by the time respondent was retained, multiple efforts to modify petitioner's loan had not succeeded, and petitioner had not made a single payment on his mortgage for more than two years. See Pet. App. 15a-16a.

Indeed, the best evidence that respondent was not seeking payment from petitioner is that it never asked him to pay. When it is desirable to seek payment from the debtor in lieu of foreclosure, a creditor (or its agent) can easily make an express demand, and creditors routinely do so. See, *e.g.*, *Birster* v. *American Home Mortgage Servicing, Inc.*, 481 Fed. Appx. 579, 580-581 (11th Cir. 2012) (per curiam); *Reese* v. *Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211, 1214 (11th Cir. 2012); *Wilson* v. *Draper & Goldberg, P.L.L.C.*, 443 F.3d 373, 376-377 (4th Cir. 2006). That respondent did not do so here confirms that it was not engaging in debt collection.

Petitioner also errs in suggesting (Br. 15-16) that the foreclosure process usually results in payment by debtors. Only a small fraction of debtors cure their defaults when faced with non-judicial foreclosure. See Colorado County Treasurers & Public Trustees, *Colorado Foreclosure Statistics* <tinyurl.com/COForeclosureStats> (last visited Nov. 7, 2018) (indicating annual cure rates ranging from 2% to 11% of new foreclosures). And while some debtors do make payments after the foreclosure process begins,

there is no evidence that any do so in response to a notice of foreclosure unaccompanied by a demand for payment. Nor does the fact that many foreclosures are withdrawn necessarily suggest widespread payment. Foreclosures can be withdrawn under Colorado law because the debtor files for bankruptcy; default cannot be established in the Rule 120 hearing; the sale is not held in a timely manner; or the process does not accord with one of many other requirements. See Colo. Rev. Stat. §§ 38-38-108, 38-38-109(2)(b)(II)(B), 38-38-109(3)(b); Colo. R. Civ. P. 120.

b. Petitioner argues that initiating a foreclosure creates an "incentive to pay up." Br. 15. But that proves too much: the existence of a security interest will always give a debtor incentive to cure a default to avoid forfeiture of the collateral. If that pressure to pay were enough to constitute debt collection, every effort to enforce a security interest would qualify as debt collection, rendering superfluous the limited-purpose definition in Section 1692a(6) for entities that enforce security interests. See pp. 19-20, *supra*.

Petitioner's view of debt collection is staggering in its apparent breadth. Under his rule, all manner of ordinary interactions would constitute debt collection; all one need do is provide information related to a debt that gives a debtor an incentive to pay. To take one example, suppose that a credit-card company contracts with a credit-reporting service to send customers their credit scores periodically as a perk. If a customer defaults on his payments and receives a credit report reflecting a decrease in his credit score, the customer may view that as a reason to cure the default by tendering payment. On petitioner's view, a credit-reporting service that regularly sends such reports would be a debt collector subject to the FDCPA (and, almost inevitably, would have run afoul of the

FDCPA's substantive requirements, see, *e.g.*, 15 U.S.C. 1692e(11)).

c. Beyond the "incentive to pay up" inherent in the existence of a security interest, petitioner identifies nothing about the relevant notices here that suggested respondent was seeking payment. Accordingly, both courts below concluded that respondent did not seek payment from petitioner. See Pet. App. 12a, 20a-21a. And petitioner himself acknowledges that the question before the Court is "whether non-judicial foreclosure *without* additional conduct qualifies as debt collection." Br. 11 n.5.

Despite that concession, petitioner now suggests that respondent did seek payment from him. See Br. 15. In making that argument, petitioner relies on four documents. Two of them—a notice providing information about foreclosure resources (as required by state law) and a payoff quote provided in response to petitioner's request—are not properly before the Court, both because they were not referenced in or attached to the complaint and because they were not relied upon or addressed below. See *ibid.* (citing J.A. 42-43, 44-45).[8]

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[8] Nor do those documents help petitioner in any event. The notice providing information about the Colorado "foreclosure hotline" and the phone number of the creditor's "loss mitigation representative" is a prerequisite to foreclosure under Colorado law, and it serves to provide the debtor with information about resources rather than to demand payment. Colo. Rev. Stat. § 38-38-102.5(2)(a)-(b); see J.A. 42-43. And the payoff quote cannot be construed as a request for payment because respondent sent it at "[petitioner's] request." J.A. 45; see J.A. 46-47; *Grden* v. *Leikin Ingber & Winters PC*, 643 F.3d 169, 173 (6th Cir. 2011). Even if the notices amounted to debt collection, petitioner could not prevail because the notices were sent or filed after petitioner's verification request and respondent was obligated to provide verification only if it was a debt collector *at the time of* the request. See 15 U.S.C. 1692g(b); p. 16, *supra*.

Petitioner takes out of context statements in the remaining two documents. See Br. 15 (citing J.A. 37-38, 39-41). The first is respondent's initial notice informing petitioner that respondent was "instructed to commence foreclosure against the above-referenced property." J.A. 37. Beyond that single sentence, the notice contained information and disclaimers in an effort to comply with any potentially applicable state and federal law, including information about the amount of the debt. J.A. 37-38. Providing information about a debtor's rights, however, plainly does not amount to a request that the debtor exercise those rights. As the court of appeals concluded, it is "clear" that "[respondent] did not demand payment nor use foreclosure as a threat to elicit payment," whether in that notice or otherwise. Pet. App. 12a; see *id.* at 9a. The second document is the notice of election and demand for sale, which explained that the creditor declared a default and was initiating a foreclosure based on the "failure to make timely payments." J.A. 39. But that notice—which was directed not to petitioner, but to the public trustee—simply described the basis for the default rather than seeking payment. J.A. 23, 39.

d. Finally on this point, petitioner suggests (Br. 18-19) that the rule adopted below is difficult to administer. Not so. The court of appeals held only that initiating a foreclosure, without more, does not constitute debt collection. Under that holding, courts will continue to use the analysis they already perform to determine whether an entity engaged in debt collection, objectively evaluating whether the entity sought to induce payment from the debtor. See, *e.g.*, *Schlaf* v. *Safeguard Property, LLC*, 899 F.3d 459, 467-468 (7th Cir. 2018); *Grden* v. *Leikin Ingber & Winters PC*, 643 F.3d 169, 173 (6th Cir. 2011). It is petitioner's proposed rule that is murky: petitioner would seemingly sweep into the FDCPA entities that take steps

related to enforcing security interests and entities that give debtors an incentive to pay debts. See pp. 27-30, *supra*.

2. Petitioner also contends (Br. 19-20) that initiating a non-judicial foreclosure constitutes "indirect" debt collection. That contention lacks merit.

a. The FDCPA includes in the definition of "debt collector" entities that regularly collect debts "directly or indirectly." 15 U.S.C. 1692a(6). As courts of appeals have recognized, "indirect" debt collection is activity that meaningfully *assists with* the collection of a debt. See, *e.g.*, *Schlaf*, 899 F.3d at 468. "Indirect" debt collection thus consists of conduct that facilitates obtaining payment from the debtor: for example, by collecting debtors' contact information to "stimulate recoveries," see *Romine* v. *Diversified Collection Services, Inc.*, 155 F.3d 1142, 1145, 1147 (9th Cir. 1998), or gathering information used to obtain payment, see *Siwulec* v. *J.M. Adjustment Services, LLC*, 465 Fed. Appx. 200, 204 (3d Cir. 2012). Here, by contrast, respondent did not seek payment from the debtor at all: the foreclosure notice was a step toward enforcing the creditor's security interest, not a step toward obtaining money from the debtor. See p. 28, *supra*.

b. In arguing that the notice at issue here constituted indirect debt collection, petitioner relies on a parenthetical in *Heintz* v. *Jenkins*, 514 U.S. 291 (1995), for the proposition that "[t]o collect a debt or claim is to obtain payment or liquidation of it, either by personal solicitation or legal proceedings." *Id.* at 294 (quoting *Black's Law Dictionary* 263 (6th ed. 1990)). Petitioner suggests that a foreclosure sale, which liquidates the property serving as security, satisfies that definition. That is incorrect. As an initial matter, the Court quoted the definition in support of its conclusion that a "lawyer who regularly tries to *ob-*

tain payment of consumer debts through legal proceedings" is attempting to "collect" those debts. *Ibid.* (emphasis added). Respondent's conduct in this case does not constitute debt collection precisely because respondent did not try to obtain payment of the debt.

More broadly, in relying on the dictionary definition quoted in *Heintz*, petitioner improperly conflates liquidating an *asset* (the secured property) with liquidating the *debt*. To liquidate an asset can mean "convert[ing] (a nonliquid asset) into cash." *Black's Law Dictionary* 1072 (10th ed. 2014). To liquidate a *debt*, however, means "to extinguish" it. *Ibid.*; see *Woodson* v. *Murdock*, 89 U.S. 351, 369 (1874) (listing "[c]omposition"—*i.e.*, settling—"accord and satisfaction, and full payment in cash" as modes of "the liquidation of [a] debt"). Liquidating a secured property by foreclosure does not extinguish the underlying debt, leaving a debtor liable for any deficiency. See Colo. Rev. Stat. § 38-38-106(6); cf. *Woodson*, 89 U.S. at 370 (citing the "very palpable distinction between [a] lien * * * and the debt, obligation, or duty which the lien was created to secure"). And even if a foreclosure could be considered liquidation of a debt, any liquidation occurs as a result of the sale—not as a result of "personal solicitation or legal proceedings," as the cited definition requires. *Heintz*, 514 U.S. at 294; see *Black's Law Dictionary* 1398 (defining "proceeding" and "legal proceeding").[9]

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[9] While the Colorado non-judicial foreclosure scheme includes a court hearing as one step in the non-judicial foreclosure process, that hearing merely confirms the default and does not conclusively authorize the foreclosure sale or yield any funds from third parties. See Colo. R. Civ. P. 120(d)(4). In any event, neither communication at issue here relates to that hearing or to any other court proceeding.

c. Petitioner also suggests (Br. 19) that engaging in foreclosure activity constitutes indirect debt collection because funds from the sale of the collateral to a third party are applied to reduce the indebtedness. To be sure, the enforcement of a security interest allows a creditor to obtain money or its equivalent from a third party while reducing or eliminating the debt. But as explained above, while the enforcement of a security interest provides the creditor with an alternative remedy that unquestionably reduces the amount of the debt, that remedy is entirely distinct from the remedy of collecting the debt itself. See pp. 4-5, 17, *supra*.

Moreover, collecting a debt requires obtaining money from the debtor, not from a third party. A debt is the "obligation *of a consumer* to pay money." 15 U.S.C. 1692a(5) (emphasis added). Collecting a debt means obtaining payment of *that* obligation. See *Webster's Second New International Dictionary* 525; *Grden*, 643 F.3d at 172; pp. 16-17, *supra*. While the FDCPA prohibits entities from obtaining payment *of the debtor's money* by harassing his employer or his relatives or embarrassing him in public, see, *e.g.*, 15 U.S.C. 1692c(b), 1692d, 1692f(7), petitioner identifies no provision that treats obtaining payment from a third party as debt collection under the statute.

Two examples illustrate why obtaining payment from a third party cannot constitute debt collection. A creditor who writes off the nonpayment of a loan as a loss on its taxes may receive some compensation that offsets the loss. But no one would say that, in obtaining that alternative compensation, the creditor is collecting the debt. Likewise, a pawn shop does not collect a debt when it sells a watch held as collateral for an unpaid loan—even though doing so eliminates the debt. Rather, the pawn shop is exercising its alternative remedy by liquidating the collat-

eral. In short, not everything that compensates the creditor or reduces the debtor's indebtedness constitutes debt collection.

3. Recognizing that the limited-purpose definition of "debt collector" stands in the way of his position, petitioner attempts preemptively to address that provision. See Br. 24-26. That effort is unavailing.

Petitioner argues that the limited-purpose definition provides "additional coverage for those who engage *only* in the enforcement of a security interest without also qualifying under the main definition." Br. 25. As petitioner acknowledges elsewhere, however, the import of his position is that *every* enforcement of a security interest also brings an entity within the general definition. See, *e.g.*, Br. 2, 16 n.7. Under petitioner's interpretation, therefore, the limited-purpose definition is entirely superfluous. That cannot be correct. See pp. 19-20, *supra*.

Petitioner suggests that the limited-purpose definition of "debt collector" has meaning because it "covers classic 'repo' activity." Br. 25. As an initial matter, there is no textual basis for reading the limited-purpose definition to apply only to repossession activity. That definition applies to the "enforcement of security interests," which, by its terms, indisputably includes foreclosure. 15 U.S.C. 1692a(6).

Congress used broad language in defining who is subject to the limited-purpose definition, then used narrower language in setting out the prohibited conduct for those entities. While any entity whose primary purpose is enforcing security interests falls within the limited-purpose definition, the referenced substantive prohibition, Section 1692f(6), governs only a small subset of enforcement activity: certain actions to "effect dispossession or disablement of property."

Petitioner contends (Br. 26) that the narrower language of that substantive prohibition gives reason to read the limited-purpose definition similarly narrowly. But that is exactly the wrong inference. Rather, the contrasting language in the two provisions shows that Congress intended them to have different scope. See, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983). That comports with the FDCPA's general approach: the FDCPA broadly defines "debt collector," then uses narrower language in other provisions to render a subset of a debt collector's activities actionable.[10]

In any event, petitioner's broad definition of debt collection would encompass even classic repossession activity. His definition covers any actions that give the debtor an incentive to pay and any actions to obtain compensation for a debt owed, no matter who makes the payment or whether the action comes in an effort to enforce a security interest. See Br. 15-16, 19-20. Repossession activity, like foreclosure activity, may give the debtor an incentive to pay the debt. See Colo. Rev. Stat. § 4-9-623 (allowing a debtor to cure after repossession until sale). And just as a non-judicial foreclosure notice is a prerequisite to col-

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[10] To the extent petitioner suggests that "enforcement of security interests" in the limited-purpose definition includes *both* foreclosure and repossession activity, and that the inclusion of repossession activity would leave the limited-purpose definition with some function, that argument likewise fails. Foreclosure is a paradigmatic way to enforce a security interest. See p. 19, *supra*. If "collection of any debts" in Section 1692a(6) already included foreclosure, phrasing the limited-purpose definition in terms of enforcing security interests would make no sense. See *Russello*, 464 U.S. at 21; cf. *Leocal*, 543 U.S. at 12 (rejecting an interpretation that would leave a provision practically devoid of significance, despite the fact that some relatively minor applications would remain).

lecting money from third parties at a subsequent sale, repossession is a necessary step to collecting money from the sale of the repossessed asset. See Br. 19-20.

In short, under petitioner's expansive definition of debt collection, there is no entity whose principal purpose is the enforcement of security interests but not the collection of debts. Petitioner's interpretation fails to give the limited-purpose definition in Section 1692a(6) any meaningful work to do.

4. Petitioner further contends that the FDCPA's venue provision, Section 1692i(a), "expressly contemplates that foreclosure constitutes 'debt collection.'" Br. 21. That is incorrect.

The venue provision directs a "debt collector who brings any legal action on a debt against any consumer," including an action to "enforce an interest in real property securing the consumer's obligation," to bring such an action in a particular judicial district. 15 U.S.C. 1692i(a). That language addresses an action by an entity that is *already* a debt collector and then proceeds to enforce a security interest. *Ibid.* Tellingly, Section 1692i(a) describes an action to enforce a real property interest not as debt collection, but as a "legal action *on a debt* against any consumer." *Ibid.* (emphasis added). That description reinforces the conclusion that foreclosure is not debt collection. What is more, Section 1692i(a) plainly addresses a *judicial* foreclosure—*i.e.*, a "legal action"—brought by a debt collector. Accordingly, Section 1692i(a) does not purport to govern anything related to a non-judicial foreclosure, even when carried out by an entity that is otherwise a debt collector.

Petitioner contends that the venue provision "only makes sense" if foreclosures fall within the full scope of the FDCPA. Br. 21. But that ignores the fact that a "debt collector" can engage in activity that is not debt collection.

For example, an entity that regularly sends demand letters asking for payment would be a "debt collector" (absent some applicable exclusion). Section 1692i merely prevents that entity from later filing in a distant venue a judicial foreclosure action—an act, it bears repeating, that Section 1692i does not describe as debt collection.

5. Petitioner argues (Br. 22) that an expansive interpretation of debt collection would advance the FDCPA's purpose of preventing "abusive" and "deceptive" debt-collection practices. But that simply begs the question. Because the enforcement of a security interest is not debt collection, Congress did not intend to regulate it. And little wonder: regulating foreclosure has long been a core function of state law. See pp. 40-41, *infra*. While only some States regulated debt-collection practices when the FDCPA was enacted, every State regulated foreclosure. See p. 26, *supra*.

In any event, as this Court has made clear in rejecting efforts to expand the definition of "debt collector," it is "quite mistaken to assume * * * that whatever might appear to further the statute's primary objective must be the law." *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) (internal quotation marks, citation, and alteration omitted). Like virtually all other legislation, the FDCPA is a product of "compromise" that does not "pursue[] its stated purpose at all costs." *Ibid.* (citation and alterations omitted). That observation is particularly salient here because the breadth of the FDCPA's regulation of the enforcement of a security interest was itself the result of a specific congressional compromise. See pp. 25-26, *supra*.

6. Citing the legislative history, petitioner observes that Congress referred to the "collection of debts, such as mortgages," and suggested that "mortgage service com-

panies" are covered by the FDCPA in certain circumstances. Br. 24 (citing S. Rep. No. 382, *supra*, at 3-4) (emphasis omitted). But application of the FDCPA to mortgage service companies (to the extent they acquire a debt after default) is entirely unremarkable, because those companies collect payments on a mortgage from the debtor both before and after default. See Federal Trade Commission, *Making Payments to Your Mortgage Servicer* (June 2010) <tinyurl.com/ftcmakingpayments>; Bureau of Consumer Financial Protection, *What's the Difference Between a Mortgage Lender and a Servicer* (Sept. 13, 2017) <tinyurl.com/askcfpb>.

In an amicus brief supporting petitioner, a handful of current members of Congress (none of whom was in Congress when the FDCPA was enacted) rely on statements by Representative Annunzio suggesting that Congress intended to include mortgage foreclosure in the FDCPA. See Members of Congress Br. 11 n.3. Each of those statements appears to refer to attempts to extract payment from the debtor by threatening sale of the property; none evinces an intention to bring foreclosure activity directly within the scope of the statute. In any event, "floor statements by individual legislators rank among the least illuminating forms of legislative history." *NLRB* v. *SW General, Inc.*, 137 S. Ct. 929, 943 (2017). And even within that category, Representative Annunzio's remarks are particularly unilluminating, because they came before the debate over competing versions of the pending legislation, one of which included enforcers of security interests in the general definition of "debt collector." See p. 25, *supra*.[11]

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[11] Petitioner also notes that *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573 (2010), arose in the context of foreclosure. See Br. 14 n.6. *Jerman* presented a question about the bona fide error defense, and the Court had no occasion to consider

D. The FDCPA Should Not Be Construed To Interfere With A Core Area Of State Concern

The text of the FDCPA makes plain that enforcing a security interest by initiating a non-judicial foreclosure is not debt collection. But even if the FDCPA were ambiguous, it should be interpreted to avoid significant interference with state foreclosure law.

1. There is an "essential state interest" in regulating foreclosure that should not be "displace[d]" unless Congress made its intent to do so "clear and manifest." *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (citation omitted). Absent clear intent by Congress to override state foreclosure law, "our federal system demands deference to long-established traditions of state regulation." *Id.* at 546; see *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

This Court has specifically refused to interpret ambiguous federal statutes in a way that would disrupt state non-judicial foreclosure schemes. In *BFP*, the Court interpreted ambiguous language in the Bankruptcy Code to avoid disrupting the "diverse" state foreclosure schemes created to "achieve what each [State] considers the proper balance between the needs of lenders and borrowers." 511 U.S. at 541-542. The Court thus held that the actual sale price at a state non-judicial foreclosure sale necessarily constituted "reasonably equivalent value" under the Code, with the result that the sale could not be

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what actions made the defendant a debt collector or whether it was acting in connection with the collection of a debt. See 559 U.S. at 580. The parties' silence on those issues is hardly surprising, because the relevant notice in *Jerman* was included in a complaint that, in addition to seeking judicial foreclosure, made an express demand for a monetary judgment against the debtor. See Compl. at 2, *Countrywide Home Loans, Inc.* v. *Jerman*, Civ. No. 06-459 (Ohio Ct. C.P. Apr. 17, 2006).

deemed a fraudulent transfer. *Id.* at 533, 545. The Court reached that conclusion despite Congress's broad powers to regulate bankruptcy. See *id.* at 543. To hold otherwise, the Court reasoned, would leave a "federally created cloud" over the title of property purchased at a foreclosure sale. *Id.* at 544.

Similarly, in *United States* v. *Brosnan*, 363 U.S. 237 (1960), the Court addressed whether federally created liens could be extinguished by state proceedings in which the federal government did not participate. The Court recognized the need for uniformity in laws relating to collecting federal taxes, but it emphasized that, by "resort[ing] to the use of liens," Congress "came into an area of complex property relationships long since settled and regulated by state law." *Id.* at 241-242. Accordingly, the Court construed federal law narrowly and held that state-law proceedings extinguished the liens. See *ibid.* The Court made clear that it would not adopt an expansive interpretation of federal law without clear "congressional direction" because such an interpretation would cause "severe dislocation" of state property law, including "non-judicial means of enforcing private liens." *Id.* at 242.[12]

Like the statutes at issue in *BFP* and *Brosnan*, the FDCPA does not evince a clear and manifest purpose to intrude upon state foreclosure law. To the contrary, the

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[12] Like the Court, Congress has been reluctant to tread on state foreclosure regimes. For instance, Congress declined to enact federal legislation that would have regulated non-judicial foreclosures by private parties. See Grant S. Nelson & Dale A. Whitman, *Reforming Foreclosure: The Uniform Nonjudicial Foreclosure Act*, 53 Duke L.J. 1399, 1413-1415 (2004). As a result, that area of law "remains largely the province of the states." *Id.* at 1415. To stretch the FDCPA to cover non-judicial foreclosure activity would be to do through the FDCPA what Congress chose not to do itself, thereby short-circuiting the legislative process in a controversial and sensitive area.

FDCPA substantively regulates conduct related to foreclosure only in a single narrow provision, see 15 U.S.C. 1692f(6), which poses no obstacle to the operation of state foreclosure law. Congress's decision to regulate the enforcement of security interests (including foreclosure) only in narrow circumstances in which the conduct necessarily violates state law reflects its desire to defer to the States in this context.

Unlike the federal laws at issue in *BFP* and *Brosnan*, moreover, the FDCPA embraces variation and takes care to preserve state law. The FDCPA expressly provides that state law is "not annul[led], alter[ed], or affect[ed]" except in cases of outright inconsistency, and that no such inconsistency exists if state law provides greater protection to consumers than does the FDCPA. 15 U.S.C. 1692n. The FDCPA's legislative history likewise reflects that Congress took "steps to minimize any * * * infringement" on States' rights. H.R. Rep. No. 131, *supra*, at 2; see S. Rep. No. 382, *supra*, at 6. It is little wonder, then, that this Court has previously recognized the force of "federalism concern[s]" in this context and has declined to construe the FDCPA in a manner that would interfere with a core state interest. See *Sheriff* v. *Gillie*, 136 S. Ct. 1594, 1602 (2016).

2. Petitioner's interpretation of the FDCPA would extensively intrude into the state-created and state-regulated foreclosure process; allow debtors to challenge foreclosures that are entirely proper under state law; and interpose an ill-fitting federal framework on state law in a core area of state concern. Several provisions of the FDCPA would render critical features of some state-law schemes unworkable, if not preempt them outright. That is no small matter: state foreclosure laws require strict compliance, and a technical defect in a foreclosure notice can render the resulting sale void. See 4 *Powell on Real*

Property § 37.42[3]. For that reason, violations of state law resulting from efforts to comply with the FDCPA would cast into doubt the validity of title after a foreclosure sale—an intolerable result. See *BFP*, 511 U.S. at 544 & n.8.

a. Conflicts with state law would be commonplace under petitioner's interpretation. For example, the FDCPA broadly bans communications with third parties by debt collectors "in connection with the collection of any debt." 15 U.S.C. 1692c(b). If engaging in foreclosure activity constituted debt collection, simply advertising a foreclosure sale—an essential requirement of all state foreclosure schemes—would often violate the FDCPA. See *Ho* v. *ReconTrust Co., NA*, 858 F.3d 568, 575 (9th Cir.), cert. denied, 38 S. Ct. 504 (2017); see also, *e.g.*, Ala. Code § 35-10-13; Ariz. Rev. Stat. Ann. § 33-808; Mich. Comp. Laws § 600.3208; Wash. Rev. Code § 61.24.040(5).

Interjecting the FDCPA in this manner would be deeply troubling for state foreclosure regulation and affirmatively harmful for debtors: robust notice of the sale fosters competitive bidding that serves to increase the sale price of a property, thereby eliminating or reducing the amount the debtor may owe in any subsequent proceeding. If the FDCPA preempted those essential notice requirements, it would disrupt the operation of each state-law regime and create uncertainty as to whether a foreclosure sale held without such notices is legitimate, placing title to the property sold under a "federally created cloud." *BFP*, 511 U.S. at 544.

Similarly, state law often requires entities engaging in non-judicial foreclosure to provide certain notices directly to the debtor or to the property address. See 1 Grant S. Nelson et al., *Real Estate Finance Law* § 7:20, at 944-945 (6th ed. 2014); see also, *e.g.*, Ariz. Rev. Stat. Ann. § 33-809(B); Colo. Rev. Stat. § 38-38-102.5(2); N.H. Rev. Stat.

Ann. § 479:25; Wash. Rev. Code § 61.24.040(1)(b)(i); Colo. R. Civ. P. 120(b)(4). But the FDCPA bans direct communication "in connection with the collection of any debt" with a debtor who is represented by counsel. 15 U.S.C. 1692c(a)(2). Under petitioner's interpretation, those state-law provisions would also be preempted by federal law because the FDCPA is more protective of the consumer on the narrow question whether the communication is permitted. See *Ho*, 858 F.3d at 575.

The provision at issue here, Section 1692g(b), which requires a debt collector to "cease collection of the debt" upon receiving a request for verification, could itself interfere with intricate state-law notice regimes. States often have strict time limits for sending foreclosure notices. See, *e.g.*, Ariz. Rev. Stat. Ann. § 33-809(C) (five business days); Cal. Civ. Code § 2924b(b)(1) (ten business days). Requiring entities to cease sending foreclosure notices until they provide verification could make it impossible in some circumstances to meet those deadlines. See *Ho*, 858 F.3d at 575.

b. Beyond such outright conflicts, imposing the FDCPA here would work at cross purposes with other provisions of state law. For instance, the FDCPA requires an initial communication with a consumer to state that the sender "is attempting to collect a debt" and that "any information obtained will be used for that purpose." 15 U.S.C. 1692e(11). Colorado law requires the foreclosing entity to provide the debtor with information about the foreclosure hotline, a state resource for avoiding foreclosure. Colo. Rev. Stat. § 38-38-102.5(2)(a). But the initial disclaimer required by the FDCPA may deter consumers from using that resource, out of concern that any information disclosed would be used against them. That

petitioner's interpretation of the FDCPA would "obstruct[]" rather than "further[]" the FDCPA's aim is all the more reason to reject it. See Scalia & Garner 63.

Similarly, the FDCPA requires a statement in the initial notice that "the debt will be assumed to be valid by the debt collector" if not disputed within 30 days. 15 U.S.C. 1692g(a)(3). But Colorado law provides a substantial mechanism for verifying the underlying debt regardless of the debtor's response within that time period. Before a non-judicial foreclosure sale, the foreclosing entity must submit evidence of the debt and attest to the facts giving rise to the default; the debtor is entitled to a hearing in which it may dispute the existence of a default and the creditor's legal authority to foreclose. See Colo. R. Civ. P. 120(a), (c), (d). And regardless whether the debtor participates, the court must determine that the creditor is entitled to proceed with the sale before allowing the foreclosure process to move forward. See Colo. R. Civ. P. 120(d)(2). Thus, while the FDCPA requires a debt collector to verify the debt only when the debtor so requests, Colorado law *always* requires proof of default—including verification of the debt.

Thrusting the FDCPA into the non-judicial foreclosure process, then, is a recipe for chaos. Far from promoting the FDCPA's aim of stopping harassing and abusive communications, it would remove state-law consumer protections specifically tailored for the foreclosure context and replace them with ill-fitting federal requirements designed (and plainly better suited) for attempts to collect money. And it would significantly interfere with the States' prerogative to regulate foreclosure. This Court should reject such an interpretation.

3. Recognizing some of the potential conflicts created by his interpretation, petitioner offers several responses. See Br. 26-28. None of those responses is persuasive.

a. Petitioner repeatedly points to the "inadequa[cy]" of state laws governing debt-collection practices. Br. 27-28; see Br. 3, 14, 16, 22. But Congress enacted the FDCPA to address inadequate state *debt-collection laws*. As discussed above, both the House and Senate Reports made clear that it was those laws, not state laws governing foreclosure, that Congress deemed lacking. See pp. 26-27, *supra*. Rather than considering state foreclosure laws inadequate, Congress and this Court have given them a great deal of deference. See pp. 40-41 & n.12, *supra*.

b. Petitioner questions whether regulating foreclosure is a traditional state interest that Congress does not lightly displace, observing that other federal statutes regulate in the area. See Br. 26-27. But in assessing whether federal law infringes on the "respect for the States as independent sovereigns in our federal system," it is "the historic presence of state law," not "the absence of federal regulation," that matters. See *Wyeth* v. *Levine*, 555 U.S. 555, 565 n.3 (2009) (internal quotation marks and citation omitted). This Court has already recognized that regulating foreclosure is a core state interest; in *BFP*, it interpreted the Bankruptcy Code—one of the federal statutes on which petitioner relies—to avoid a conflict with state law. See 511 U.S. at 544-545.

c. Petitioner invokes Section 1692o, which allows a State to obtain an exemption from the FDCPA if a federal agency determines that the State not only subjects debt-collection practices to requirements "substantially similar to those imposed by" the FDCPA but also provides for "adequate * * * enforcement." 15 U.S.C. 1692o; see Br. 27. But that mechanism offers no relief for States with extensive and consumer-protective foreclosure regimes. To qualify for the exemption, a state-law scheme must contain provisions that "correspond[]" to each of the FDCPA's substantive provisions, including definitions

that "import the same meaning and have the same application" as those in the FDCPA. 12 C.F.R. 1006.4(a)(1); see 12 C.F.R. 1006.4 (requiring provision-by-provision comparison).[13] No State's foreclosure regime could possibly qualify—further proof that a regime that governs debt collection is distinct from one governing foreclosure. See, *e.g.*, Colo. Rev. Stat. §§ 38-38-100.3 to 38-38-114. Indeed, many of the requirements that make sense for debt collectors are antithetical to the foreclosure process. See pp. 43-45, *supra*.

d. Petitioner has little to say about the state-law conflicts themselves. Aside from the bare assertion that compliance with both state and federal law "is not difficult," petitioner argues that federal law preempts state law in case of conflict; that States should amend their foreclosure laws to accommodate the FDCPA; and that the FDCPA overrides state foreclosure law that "gets in the way." Br. 27-28 & n.15. Those arguments give the back of the hand to States' core interest in regulating foreclosure. See *BFP*, 511 U.S. at 544 & n.8; pp. 40-41, *supra*.[14]

One of petitioner's amici addresses a subset of the state-law conflicts, but its responses (which petitioner does not advance) lack merit. As to state-law provisions that require notices sent directly to the consumer and to

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[13] Tellingly, only a single State has to date obtained an exemption under Section 1692o. See 60 Fed. Reg. 66,972, 66,973 (Dec. 27, 1995).

[14] Petitioner also suggests that the FDCPA already intrudes into state law because it covers judicial foreclosures. See Br. 26. It is far from obvious that the FDCPA reaches all judicial foreclosures, which provide another means of enforcing security interests. In any event, the interference with state law is much greater as to non-judicial foreclosure. The FDCPA contains multiple exceptions for judicial proceedings, and those exceptions do not apply to a state non-judicial foreclosure process such as the one at issue here. See 15 U.S.C. 1692a(6)(D), 1692c(b), 1692e(11), 1692g(d).

certain third parties, the amicus argues that creditors can avoid conflict with the FDCPA by including a consent provision in the deed of trust. See NCLC Br. 23-24. But the FDCPA allows communications based on the consumer's consent only when consent is "given directly to the debt collector." 15 U.S.C. 1692c(a), (b). In virtually every case, a provision in a deed of trust will not satisfy this requirement, because debt collectors are entities that obtain a debt after a default, well after the deed of trust is executed. See 15 U.S.C. 1692a(6)(F)(iii); *Henson*, 137 S. Ct. at 1724. In any event, forcing parties to add contract terms in an effort to accommodate federal law interferes with the States' prerogative to regulate foreclosure. See *Ho*, 858 F.3d at 576.

The same amicus also suggests that the conflict with state law can be avoided because the FDCPA exempts communications made with the "express permission of a court of competent jurisdiction." 15 U.S.C. 1692c(a), (b); see NCLC Br. 23. But the vast majority of state-law foreclosure requirements imperiled by petitioner's interpretation come from state statutes, not court orders (or even court rules). See pp. 43-44, *supra*. If the exemption could be read to cover notices required by state law, then the exemption would apply here and FDCPA liability could not exist, because the notice of election and demand for sale was required under the Colorado non-judicial foreclosure regime, as petitioner does not dispute. See Br. 16.

e. Finally, petitioner and his amici invoke the importance of the home in American life and the dangers of abuse in this context. See, *e.g.*, Br. 3. But that is the very reason that States have longstanding rules governing foreclosures and providing protections for debtors. Petitioners offer no reason to take the cudgel of the FDCPA to state-law foreclosure regimes. Rather than addressing

concerns specific to foreclosure, the FDCPA would undermine the state frameworks designed for that purpose. The benefits of the FDCPA expansion petitioner seeks, in turn, would accrue primarily to the lawyers responsible for the "cottage industry" of litigation that has arisen under the FDCPA. Cf. *Federal Home Loan Mortgage Corp.* v. *Lamar*, 503 F.3d 504, 513 (6th Cir. 2007) (citation omitted). This Court should decline petitioner's invitation to effect such a dramatic change, and it should instead leave federal law to regulate debt-collection practices and state law to regulate foreclosure.

* * * * *

The plain language of the FDCPA disposes of this case. Respondent was neither a debt collector nor engaging in debt collection simply by initiating a non-judicial foreclosure. And if any doubt remains, the Court should reject petitioner's interpretation on the ground that it would "radically readjust[] the balance of state and national authority." *BFP*, 511 U.S. at 544 (citation omitted). The court of appeals correctly held that merely enforcing a security interest by initiating a non-judicial foreclosure under Colorado law does not constitute debt collection under the FDCPA, and its judgment should be affirmed.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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NOVEMBER 2018

APPENDIX

APPENDIX

15 U.S.C. 1692-1692p provides:

§ 1692. Congressional findings and declaration of purpose

(a) Abusive practices

There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.

(b) Inadequacy of laws

Existing laws and procedures for redressing these injuries are inadequate to protect consumers.

(c) Available non-abusive collection methods

Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts.

(d) Interstate commerce

Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.

(e) Purposes

It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive

debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

§ 1692a. Definitions

As used in this subchapter—

(1) The term "Bureau" means the Bureau of Consumer Financial Protection.

(2) The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium.

(3) The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.

(4) The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.

(5) The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

(6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be

owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include—

(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

(B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;

(C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;

(D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

(E) any nonprofit organization which, at the request of consumers, performs bona fide

consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and

(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

(7) The term "location information" means a consumer's place of abode and his telephone number at such place, or his place of employment.

(8) The term "State" means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing.

§ 1692b. Acquisition of location information

Any debt collector communicating with any person other than the consumer for the purpose of acquiring location information about the consumer shall—

(1) identify himself, state that he is confirming or correcting location information concerning the consumer, and, only if expressly requested, identify his employer;

(2) not state that such consumer owes any debt;

(3) not communicate with any such person more than once unless requested to do so by such person or unless the debt collector reasonably believes that the earlier response of such person is erroneous or incomplete and that such person now has correct or complete location information;

(4) not communicate by post card;

(5) not use any language or symbol on any envelope or in the contents of any communication effected by the mails or telegram that indicates that the debt collector is in the debt collection business or that the communication relates to the collection of a debt; and

(6) after the debt collector knows the consumer is represented by an attorney with regard to the subject debt and has knowledge of, or can readily ascertain, such attorney's name and address, not communicate with any person other than that attorney, unless the attorney fails to respond within a reasonable period of time to communication from the debt collector.

§ 1692c. Communication in connection with debt collection

(a) Communication with the consumer generally

Without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt—

(1) at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer. In the absence of knowledge of circumstances to the contrary, a debt collector shall assume that the convenient time for communicating with a consumer is after 8 o'clock antemeridian and before 9 o'clock postmeridian, local time at the consumer's location;

(2) if the debt collector knows the consumer is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the attorney fails to respond within a reasonable period of time to a communication from the debt collector or unless the attorney consents to direct communication with the consumer; or

(3) at the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.

(b) Communication with third parties

Except as provided in section 1692b of this title, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

(c) Ceasing communication

If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt, except—

(1) to advise the consumer that the debt collector's further efforts are being terminated;

(2) to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or

(3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.

If such notice from the consumer is made by mail, notification shall be complete upon receipt.

(d) "Consumer" defined

For the purpose of this section, the term "consumer" includes the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator.

§ 1692d. Harassment or abuse

A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The use or threat of use of violence or other criminal means to harm the physical person, reputation, or property of any person.

(2) The use of obscene or profane language or language the natural consequence of which is to abuse the hearer or reader.

(3) The publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency or to persons meeting the requirements of section 1681a(f) or 1681b(3) of this title.

(4) The advertisement for sale of any debt to coerce payment of the debt.

(5) Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.

(6) Except as provided in section 1692b of this title, the placement of telephone calls without meaningful disclosure of the caller's identity.

§ 1692e. False or misleading representations

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.

(2) The false representation of—

(A) the character, amount, or legal status of any debt; or

(B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.

(3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.

(4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

(6) The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to—

(A) lose any claim or defense to payment of the debt; or

(B) become subject to any practice prohibited by this subchapter.

(7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.

(8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.

(9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

(11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.

(12) The false representation or implication that accounts have been turned over to innocent purchasers for value.

(13) The false representation or implication that documents are legal process.

(14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

(15) The false representation or implication that documents are not legal process forms or do not require action by the consumer.

(16) The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 1681a(f) of this title.

§ 1692f. Unfair practices

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

(2) The acceptance by a debt collector from any person of a check or other payment instrument postdated by more than five days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than ten nor less than three business days prior to such deposit.

(3) The solicitation by a debt collector of any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution.

(4) Depositing or threatening to deposit any postdated check or other postdated payment instrument prior to the date on such check or instrument.

(5) Causing charges to be made to any person for communications by concealment of the true purpose of the communication. Such charges include,

but are not limited to, collect telephone calls and telegram fees.

(6) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if—

(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;

(B) there is no present intention to take possession of the property; or

(C) the property is exempt by law from such dispossession or disablement.

(7) Communicating with a consumer regarding a debt by post card.

(8) Using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business.

§ 1692g. Validation of debts

(a) Notice of debt; contents

Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing—

(1) the amount of the debt;

(2) the name of the creditor to whom the debt is owed;

(3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;

(4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and

(5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

(b) Disputed debts

If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector. Collection activities and communications that do not otherwise violate this subchapter may continue during the 30-day period referred to in subsection (a) unless the consumer has notified the debt collector

in writing that the debt, or any portion of the debt, is disputed or that the consumer requests the name and address of the original creditor. Any collection activities and communication during the 30-day period may not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt or request the name and address of the original creditor.

(c) Admission of liability

The failure of a consumer to dispute the validity of a debt under this section may not be construed by any court as an admission of liability by the consumer.

(d) Legal pleadings

A communication in the form of a formal pleading in a civil action shall not be treated as an initial communication for purposes of subsection (a).

(e) Notice provisions

The sending or delivery of any form or notice which does not relate to the collection of a debt and is expressly required by Title 26, title V of Gramm-Leach-Bliley Act, or any provision of Federal or State law relating to notice of data security breach or privacy, or any regulation prescribed under any such provision of law, shall not be treated as an initial communication in connection with debt collection for purposes of this section.

§ 1692h. Multiple debts

If any consumer owes multiple debts and makes any single payment to any debt collector with respect to such debts, such debt collector may not apply such payment to any debt which is disputed by the consumer and, where applicable, shall apply such payment in accordance with the consumer's directions.

§ 1692i. Legal actions by debt collectors

(a) Venue

Any debt collector who brings any legal action on a debt against any consumer shall—

(1) in the case of an action to enforce an interest in real property securing the consumer's obligation, bring such action only in a judicial district or similar legal entity in which such real property is located; or

(2) in the case of an action not described in paragraph (1), bring such action only in the judicial district or similar legal entity—

(A) in which such consumer signed the contract sued upon; or

(B) in which such consumer resides at the commencement of the action.

(b) Authorization of actions

Nothing in this subchapter shall be construed to authorize the bringing of legal actions by debt collectors.

§ 1692j. Furnishing certain deceptive forms

(a) It is unlawful to design, compile, and furnish any form knowing that such form would be used to create the false belief in a consumer that a person other than the creditor of such consumer is participating in the collection of or in an attempt to collect a debt such consumer allegedly owes such creditor, when in fact such person is not so participating.

(b) Any person who violates this section shall be liable to the same extent and in the same manner as a debt collector is liable under section 1692k of this title for failure to comply with a provision of this subchapter.

§ 1692k. Civil liability

(a) Amount of damages

Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of—

(1) any actual damage sustained by such person as a result of such failure;

(2)

(A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000; or

(B) in the case of a class action, (i) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector; and

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

(b) Factors considered by court

In determining the amount of liability in any action under subsection (a), the court shall consider, among other relevant factors—

(1) in any individual action under subsection (a)(2)(A), the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional; or

(2) in any class action under subsection (a)(2)(B), the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, the resources of the debt collector, the number of persons adversely affected, and the extent to which the debt collector's noncompliance was intentional.

(c) Intent

A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

(d) Jurisdiction

An action to enforce any liability created by this subchapter may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within one year from the date on which the violation occurs.

(e) Advisory opinions of Bureau

No provision of this section imposing any liability shall apply to any act done or omitted in good faith in conformity with any advisory opinion of the Bureau, notwithstanding that after such act or omission has occurred, such opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

§ 1692*l*. Administrative enforcement

(a) Federal Trade Commission

The Federal Trade Commission shall be authorized to enforce compliance with this subchapter, except to the extent that enforcement of the requirements imposed under this subchapter is specifically committed to another Government agency under any of paragraphs (1) through (5) of subsection (b), subject to subtitle B of the Consumer Financial Protection Act of 2010. For purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act (15 U.S.C. 41 et seq.), a violation of this subchapter shall be deemed an unfair or deceptive act or practice in violation of that Act. All of the functions and powers of the Federal Trade Commission under the Federal Trade Commission Act are available to the Federal Trade Commission to enforce compliance by any person with this subchapter, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests under the Federal Trade Commission Act, including the power to enforce the provisions of this subchapter, in the same manner as if the violation had been a violation of a Federal Trade Commission trade regulation rule.

(b) Applicable provisions of law

Subject to subtitle B of the Consumer Financial Protection Act of 2010, compliance with any requirements imposed under this subchapter shall be enforced under—

(1) section 8 of the Federal Deposit Insurance Act, by the appropriate Federal banking agency, as defined in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)), with respect to—

(A) national banks, Federal savings associations, and Federal branches and Federal agencies of foreign banks;

(B) member banks of the Federal Reserve System (other than national banks), branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act; and

(C) banks and State savings associations insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System), and insured State branches of foreign banks;

(2) the Federal Credit Union Act, by the Administrator of the National Credit Union Administration with respect to any Federal credit union;

(3) subtitle IV of Title 49, by the Secretary of Transportation, with respect to all carriers subject to the jurisdiction of the Surface Transportation Board;

(4) part A of subtitle VII of Title 49, by the Secretary of Transportation with respect to any air carrier or any foreign air carrier subject to that part;

(5) the Packers and Stockyards Act, 1921 (except as provided in section 406 of that Act), by the Secretary of Agriculture with respect to any activities subject to that Act; and

(6) subtitle E of the Consumer Financial Protection Act of 2010, by the Bureau, with respect to any person subject to this subchapter.

The terms used in paragraph (1) that are not defined in this subchapter or otherwise defined in section 3(s) of the Federal Deposit Insurance Act (12 U.S.C. 1813(s)) shall have the meaning given to them in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101).

(c) Agency powers

For the purpose of the exercise by any agency referred to in subsection (b) of its powers under any Act referred to in that subsection, a violation of any requirement imposed under this subchapter shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in subsection (b), each of the agencies referred to in that subsection may exercise, for the purpose of enforcing compliance with any requirement imposed under this subchapter any other authority conferred on it by law, except as provided in subsection (d).

(d) Rules and regulations

Except as provided in section 1029(a) of the Consumer Financial Protection Act of 2010, the Bureau may prescribe rules with respect to the collection of debts by debt collectors, as defined in this subchapter.

§ 1692m. Reports to Congress by the Bureau; views of other Federal agencies

(a) Not later than one year after the effective date of this subchapter and at one-year intervals thereafter, the Bureau shall make reports to the Congress concerning the administration of its functions under this subchapter, including such recommendations as the Bureau deems necessary or appropriate. In addition, each report of the Bureau shall include its assessment of the extent to which compliance with this subchapter is being achieved and a summary of the enforcement actions taken by the Bureau under section 1692*l* of this title.

(b) In the exercise of its functions under this subchapter, the Bureau may obtain upon request the views of any other Federal agency which exercises enforcement functions under section 1692*l* of this title.

§ 1692n. Relation to State laws

This subchapter does not annul, alter, or affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency. For purposes of this section, a State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection provided by this subchapter.

§ 1692o. Exemption for State regulation

The Bureau shall by regulation exempt from the requirements of this subchapter any class of debt collection practices within any State if the Bureau determines that under the law of that State that class of debt collection

practices is subject to requirements substantially similar to those imposed by this subchapter, and that there is adequate provision for enforcement.

§ 1692p. Exception for certain bad check enforcement programs operated by private entities

(a) In general

(1) Treatment of certain private entities

Subject to paragraph (2), a private entity shall be excluded from the definition of a debt collector, pursuant to the exception provided in section 1692a(6) of this title, with respect to the operation by the entity of a program described in paragraph (2)(A) under a contract described in paragraph (2)(B).

(2) Conditions of applicability

Paragraph (1) shall apply if—

(A) a State or district attorney establishes, within the jurisdiction of such State or district attorney and with respect to alleged bad check violations that do not involve a check described in subsection (b), a pretrial diversion program for alleged bad check offenders who agree to participate voluntarily in such program to avoid criminal prosecution;

(B) a private entity, that is subject to an administrative support services contract with a State or district attorney and operates under the direction, supervision, and control of such State or district attorney, operates the pretrial diversion program described in subparagraph (A); and

(C) in the course of performing duties delegated to it by a State or district attorney under the contract, the private entity referred to in subparagraph (B)—

(i) complies with the penal laws of the State;

(ii) conforms with the terms of the contract and directives of the State or district attorney;

(iii) does not exercise independent prosecutorial discretion;

(iv) contacts any alleged offender referred to in subparagraph (A) for purposes of participating in a program referred to in such paragraph—

(I) only as a result of any determination by the State or district attorney that probable cause of a bad check violation under State penal law exists, and that contact with the alleged offender for purposes of participation in the program is appropriate; and

(II) the alleged offender has failed to pay the bad check after demand for payment, pursuant to State law, is made for payment of the check amount;

(v) includes as part of an initial written communication with an alleged offender a clear and conspicuous statement that—

(I) the alleged offender may dispute the validity of any alleged bad check violation;

(II) where the alleged offender knows, or has reasonable cause to believe, that the alleged bad check violation is the result of theft or forgery of the check, identity theft, or other fraud that is not the result of the conduct of the alleged offender, the alleged offender may file a crime report with the appropriate law enforcement agency; and

(III) if the alleged offender notifies the private entity or the district attorney in writing, not later than 30 days after being contacted for the first time pursuant to clause (iv), that there is a dispute pursuant to this subsection, before further restitution efforts are pursued, the district attorney or an employee of the district attorney authorized to make such a determination makes a determination that there is probable cause to believe that a crime has been committed; and

(vi) charges only fees in connection with services under the contract that have been authorized by the contract with the State or district attorney.

(b) Certain checks excluded

A check is described in this subsection if the check involves, or is subsequently found to involve—

(1) a postdated check presented in connection with a payday loan, or other similar transaction, where the payee of the check knew that the issuer had insufficient funds at the time the check was made, drawn, or delivered;

(2) a stop payment order where the issuer acted in good faith and with reasonable cause in stopping payment on the check;

(3) a check dishonored because of an adjustment to the issuer's account by the financial institution holding such account without providing notice to the person at the time the check was made, drawn, or delivered;

(4) a check for partial payment of a debt where the payee had previously accepted partial payment for such debt;

(5) a check issued by a person who was not competent, or was not of legal age, to enter into a legal contractual obligation at the time the check was made, drawn, or delivered; or

(6) a check issued to pay an obligation arising from a transaction that was illegal in the jurisdiction of the State or district attorney at the time the check was made, drawn, or delivered.

(c) Definitions

For purposes of this section, the following definitions shall apply:

(1) State or district attorney

The term "State or district attorney" means the chief elected or appointed prosecuting attorney in a district, county (as defined in section 2 of title 1), municipality, or comparable jurisdiction, including State attorneys general who act as chief elected or appointed prosecuting attorneys in a district, county (as so defined), municipality or comparable jurisdiction, who may be referred to by a variety of titles such as district attorneys, prosecuting attorneys, commonwealth's attorneys, solicitors, county attorneys, and state's attorneys, and who are responsible for the prosecution of State crimes and violations of jurisdiction-specific local ordinances.

(2) Check

The term "check" has the same meaning as in section 5002(6) of title 12.

(3) Bad check violation

The term "bad check violation" means a violation of the applicable State criminal law relating to the writing of dishonored checks.

No. 17-1307

In the Supreme Court of the United States

DENNIS OBDUSKEY, PETITIONER

v.

MCCARTHY & HOLTHUS LLP, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

Non-judicial foreclosure easily qualifies as "debt collection" under the FDCPA. It directly attempts to collect a debt by sending notices that declare a default and announce the consequences of failing to cure. No one receives such a notice and reads it as anything but announcing a final chance to pay before the devastating prospect of losing one's family home. And if those notices fail to induce payment, the consumer's house is sold to pay the "debt[] owed." 15 U.S.C. 1692a(6). Put simply, "[w]hether through reinstatement or less directly through foreclosure sale and recovery of the proceeds, '[t]here can be no serious doubt that the ultimate purpose of foreclosure is the payment of money.'" *Alaska Trustee, LLC* v. *Ambridge*, 372 P.3d 207, 216 (Alaska 2016).

At some level, respondent understands all this, so it offers a series of workarounds to avoid the Act's plain language (and simple common sense). It says that state-mandated notices are somehow immune, but cannot identify any supporting textual hook in the statute. It claims that only "express" demands for payment are covered—no matter how obvious the message ("direct[] *or indirect[]*") might be. It argues that only an attempt to collect money *from the consumer* qualifies under the statute—an atextual addition that ignores the actual statutory language (which focuses on attempts to collect "debts owed," not the *source* of funds to pay those debts). And it insists that "enforcement of security interests" (a category phrased as a clear *inclusion*, not exclusion) is mutually exclusive with ordinary debt collection—even if the enforcement activity unambiguously qualifies as full debt collection under the Act. And, finally, in a last-ditch effort, it says that petitioner's reading would leave security enforcement a

null set—all while ignoring the entire industry of repossession agents who do exactly what Section 1692f(6) contemplates: "effect[ing] dispossession or disablement of property" *without* any corresponding attempt to collect a debt. (A car towed back to the creditor in the middle of the night, without any contact or communication, is both commonplace and obviously outside the FDCPA's main definition.)

The fact remains that Congress included a broad definition of debt collection, expressly contemplated foreclosure activity as "action on a debt," and provided consumer safeguards that are every bit as necessary in this vulnerable context (involving the consumer's most precious asset and essential well-being) as dunning letters over cable bills and credit cards. It is little surprise that respondent and the collection industry would prefer not to be held responsible for all-too-often mistakes in the foreclosure setting. But non-judicial foreclosure is unequivocally included under a straightforward reading of the Act, and there is no ground for asking the judiciary to rewrite the Act to accommodate the collection industry's policy preferences. The Tenth Circuit's contrary determination was wrong, and its judgment should be reversed.

ARGUMENT

NON-JUDICIAL FORECLOSURE CONSITUTES DEBT COLLECTION UNDER THE FDCPA

A. According To The Act's Plain And Ordinary Meaning, Non-Judicial Foreclosure Qualifies As "Debt Collection"

Non-judicial foreclosure readily qualifies as direct and indirect debt collection, and respondent's efforts to evade the obvious are unavailing.

1. a. According to respondent, all of its foreclosure-related notices were required by state law, and state-mandated notices are somehow excluded from the FDCPA. Respondent is wrong. Br. 23-24; accord U.S. Br. 11 ("[a]ctions that are legally required to enforce a security interest are not debt collection under the FDCPA").

First and foremost, respondent's position has absolutely no textual support. These notices are not exempt anywhere in the four corners of the Act, which is why neither respondent nor the government (nor any of the eight bottomside amicus briefs) could identify a single word, clause, phrase, subsection, or provision supporting their views. If Congress intended to exempt state-required notices, the exemption would appear textually in the Act itself. Neither respondent nor the government has offered any basis to presume that "statutorily required" notices are automatically exempt per some unspoken background principle of federal law.

Moreover, the text that respondent *omits* is all the more telling: the Act does indeed exempt a narrow set of *state-mandated notices*, but not these. Under Section 1692g(e), the Act's validation requirement is not activated by "any form or notice which [i] *does not relate to the collection of a debt* and [ii] is expressly required by * * * any provision of Federal or State law relating to notice of *data security breach or privacy*." 15 U.S.C. 1692g(e) (emphases added). This emphatically shows that Congress knew how to exempt "statutorily required" notices when it wished—and the very fact that it felt compelled to exempt *certain* notices suggests that *all other notices were already covered by the Act*. Otherwise, there would have been nothing to exempt. And even then, Congress still included such notices when they "relate[d] to the collection of a debt," confirming Congress's paramount focus on

capturing the full universe ("direct[] or indirect[]") of collection activity.

This pattern again reappears in the Act's other provisions, where targeted filings are excluded from coverage (*e.g.*, 15 U.S.C. 1692g(d); 15 U.S.C. 1692e(11)), and where Congress exempted state *"officer[s] or employee[s]"*—but not state-required *notices*—from the Act's purview (15 U.S.C. 1692a(6)(C)). Congress thus was well aware of the State's potential role in directing aspects of public and private conduct. But its careful accommodations did not excuse "collection" behavior simply because it was required by state law.

Nor is this legislative choice at all surprising. The entire premise of the Act was that *state law had proven insufficient*. As its preamble declared, the FDCPA redressed "inadequac[ies]" in state law that left consumers exposed to wrongful and abusive collection practices. 15 U.S.C. 1692(b). It would be self-defeating to withdraw the Act's protections merely because some "inadequate" state law happened to approve a "dunning"-esque disclosure.

And while respondent implicitly presumes that state-mandated notices fail to implicate the Act's concerns, actual experience proves otherwise. State-required forms can be virtually indistinguishable from classic dunning letters. New York law, for example, required a "rent demand" as "a condition precedent to a summary eviction." *Romea* v. *Heiberger & Assocs.*, 163 F.3d 111, 113 (2d Cir. 1998). California's non-judicial foreclosure notice declares a "default," threatens foreclosure, instructs how "to arrange for payment to stop the foreclosure," and even confirms the home "may be sold to satisfy [the consumer's] obligation" (*i.e., to obtain payment on the "debt[] owed,"* 15 U.S.C. 1692a(6)). United Trs. Ass'n Amicus Br. App. 1a-2a. And the notice in this case conveyed a materially identical message. Pet. Br. 15 (so establishing).

These letters pose the same dangers and risks whether they are sent voluntarily or mandated by state law. They put the same pressure on debtors, and they create the same openings for misstating the "amount" of the debt (15 U.S.C. 1692e(2)), inflating the amounts owed, or demanding unauthorized fees (15 U.S.C. 1692f(1))—as foreclosure mills have been repeatedly caught doing.[1] And the ordinary consumer reads and understands the notice the same way whether it was required by state law or not.

The statute does not say that conduct qualifying as debt collection is somehow *not* debt collection if it is compelled or required by state law; if the demand qualifies as a "direct[] or indirect[]" attempt to collect a debt, it constitutes debt collection under Section 1692a(6).[2]

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[1] See, *e.g.*, Reuters, *Two more Colorado foreclosure law firms charged with fraud* (Dec. 22, 2014) <https://tinyurl.com/more-Colo-fraud> (reporting Colorado AG's suit accusing "the state's two largest" foreclosure firms of "defrauding homeowners, investors and taxpayers by grossly hiking costs and padding bills with unauthorized expenses"); Philip V. Martino, et al., *Foreclosure Issues in the Wake of the Subprime/Financial Crisis*, 11 Westlaw J. Bankr. 1, 2-3 (Sept. 25, 2014) (recounting "devastating" mistakes by "'foreclosure mill' law firms," including "[f]oreclosing on the wrong propert[ies]" and failing to "assure the accuracy" of "balance due calculations"); David A. Dana, *Why Mortgage "Formalities" Matter*, 24 Loy. Consumer L. Rev. 505, 512 (2012) (recounting San Francisco's audit of "power-of-sale" foreclosures and finding that "'clear violations of law' were not just commonplace but were considered the norm," casting doubt on 'the validity of almost every foreclosure it examined'").

[2] Nor can respondent or the government sidestep this problem by suggesting that any step required to enforce a security interest is exempt. As explained below, this wrongly presumes that security enforcement is excluded from the Act's coverage, even where the same conduct qualifies as classic debt-collection activity. If the action qual-

b. In an effort to dodge coverage, respondent argues its foreclosure notices did not include "express" demands for payment, which it says excuses itself from the Act. Br. 28. Both respondent's premise and its conclusion are wrong.

Its premise is wrong because these notices most assuredly do qualify as "express" demands for payment. They declare a default, state the amount owed, identify who to pay, provide contacts for "loss mitigation" (read: other ways to pay), and state the consequence of not paying. Pet. Br. 15; J.A. 37-45. There is zero chance of confusion: no normal consumer reads those statements and thinks the creditor is merely hoping to cut off "the equity of redemption." Contra Resp. Br. 4, 27. She instead understands the notice as the last chance to pay the debt before losing her home. Respondent cannot articulate any real-world difference between that message and one explicitly demanding payment.[3]

And respondent's conclusion is wrong because "nothing in [the Act's] language" *requires* an "express demand for payment." *McCray* v. *Fed. Home Loan Mortg. Corp.*, 839 F.3d 354, 359 (4th Cir. 2016). On the contrary, the Act covers "direct[] or indirect[]" attempts to collect debt, and sending an unmistakable message to pay (by declaring the

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ifies as debt collection, *it is debt collection*. The Act does not give parties a free pass simply because their collection activity is also required to enforce a security interest.

[3] Respondent tries to avoid scrutiny by suggesting certain notices are not properly before the Court. Br. 30. Yet those notices were submitted (without objection) in the record below, and those notices mirror (according to respondent itself) the language required by Colorado law—which most assuredly *is* before the Court. While the initial notice itself qualifies as an obvious attempt to collect a debt, there is no basis for ignoring the other documents in the record.

consequences of *not* paying) qualifies at least as "indirect" debt collection: "a communication need not contain an explicit demand for payment to constitute debt collection activity." *McLaughlin* v. *Phelan Hallinan & Schmieg, LLP*, 756 F.3d 240, 245-246 (3d Cir. 2014).[4]

Respondent retorts that "indirect" collection under the Act focuses solely on "conduct that facilitates obtaining payment from the debtor." Br. 32 (discussing, *e.g.*, "gathering information"). But there is no basis for artificially cabining the Act's language that way. Respondent is correct that *some* indirect attempts may involve facilitating collection, but that hardly means *all* indirect attempts must serve the same function. It is the difference between necessary and sufficient. Congress could have said direct attempts or anything that "assists" such attempts (Br. 32), but it instead paired "direct[]" and "indirect[]" together, and thus put them on equal footing. The message is obvious: Congress sought to cover the broad universe of activity obtaining payment on "debts owed." 15 U.S.C. 1692a(6).[5]

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[4] While the security interest itself may "give a debtor incentive to cure" (Br. 29), it is the *leveraging* of the security interest that constitutes direct or indirect debt collection. When the consumer is being left alone, there is no qualifying action. And where the security interest is enforced *without* communication or warning (as in the classic "repo" setting), there is no pressure to pay *because the consumer is not even aware of the repossession until it is over*. Respondent skips over these obvious differences.

[5] Respondent argues that its "notice of election and demand" was directed at the trustee, not petitioner. Br. 31. Yet "communication" under the Act captures "the conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. 1692a(2). Respondent knew the notice would reach petitioner (as state law required, see Colo. Rev. Stat. § 38-38-103), and the fact that it was "filed" with the public trustee does not change the substance of the message.

This conclusion not only promotes the Act's plain language, but it also avoids an administrability nightmare. Respondent says that it is easy to tell the difference between collection demands and mere informational "notices." Yet no normal person receiving these notices thinks the creditor does not want the money. And declaring the consequence of failing to pay is functionally indistinguishable from a demand to pay. If the FDCPA nevertheless includes one and excludes the other, courts will waste endless time parsing the language of each notice and searching for impossible distinctions between "demands" and simple "heads-ups." Such a bootless exercise promises uncertainty for all sides, and it fails to honor the FDCPA's fundamental purpose: protecting consumers from misconduct and abuse, however clever the notice's wording might be.

c. At a minimum, non-judicial foreclosure "indirectly" collects the "debt owed" by selling the house to pay the debt. *E.g.*, *Ambridge*, 372 P.3d at 216 ("foreclosing on property, selling it, and applying the proceeds to the underlying indebtedness constitute one way of collecting a debt—if not directly at least indirectly"). Indeed, respondent's own filing with the public trustee demanded selling the "property *for the purpose of paying the indebtedness*." J.A. 40 (emphasis added); see also Colo. Rev. Stat. § 38-38-111. And respondent's own amici are candid about the result: non-judicial foreclosures "pursu[e] proceeds from a trustee sale" to "reduce the debt owed on the mortgage." Legal League 100 Amicus Br. 3.[6]

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[6] Respondent quibbles with petitioner's use of the definition from *Heintz* v. *Jenkins*, 514 U.S. 291 (1995), saying that petitioner "conflates" liquidating the debt with liquidating the collateral. Br. 33; see also Pet. Br. 19 ("collecting a debt means 'to obtain payment or liqui-

In response, respondent argues that foreclosure is not debt collection because the sale proceeds come from third parties, and "collecting a debt" means "obtaining a payment of money *from the debtor*." Br. 17 (emphasis added). Respondent has plucked the italicized phrase out of thin air. It surely does not appear anywhere in the statutory definition, which simply focuses on the "debts owed." It does not say, for example, "attempts to collect *from the debtor*." It is thus irrelevant "that the money collected at a foreclosure sale does not come directly from the debtor." *Ho* v. *ReconTrust Co., N.A.*, 858 F.3d 568, 578 (9th Cir. 2017) (Korman, D.J., dissenting). While the object of the collection must be satisfying the "debts owed," it can be satisfied via any source.

And it is little wonder Congress framed the statute this way. A contrary reading would expose a debtor's parents, spouse, best friends, and others to dunning by debt collectors. The Act's surrounding provisions confirm this view (see Pet. Br. 20 & n.10), and respondent has offered no reason to graft its proposed limitation onto the Act's plain text. Indeed, as a matter of everyday usage, anyone watching their house sold at foreclosure, with the proceeds automatically dedicated to pay off the debt, would say the foreclosure was used to pay the "debts owed."[7]

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dation of it'") (quoting *Heintz*, 514 U.S. at 294). What respondent ignores is that "liquidating the debt" *includes* liquidating the collateral *to liquidate the debt* (i.e., "'to extinguish' it," Resp. Br. 33). The ultimate import is the same: the asset is liquidated to satisfy the amount owed. *E.g.*, *Shapiro*, 823 P.2d at 124 ("a foreclosure is a method of collecting a debt by acquiring and selling secured property to satisfy a debt"). In any event, non-judicial foreclosure satisfies respondent's own dictionary reading: selling the house "obtains payment" on the consumer's debt. Br. 16-17.

[7] The fact that the "debt" is an "obligation of a consumer to pay money" (15 U.S.C. 1692a(5)) does not suggest otherwise. Contra

In sum, it blinks reality to say that the sale is not an attempt (indirect if not direct) to "obtain payment" for the debt.[8]

2. a. According to respondent and the government, petitioner's reading of the statute would erase the FDCPA's clear distinction between ordinary debt collection and enforcing security interests. As they see it, if enforcing a security interest is always debt collection, then the additional definition is "superfluous." Resp. Br. 15, 29; U.S. Br. 12, 15.

Their reading is wrong. First, under the plain text, the two definitions are not mutually exclusive. *E.g.*, *Piper* v. *Portnoff Law Assocs., Ltd.*, 396 F.3d 227, 236 (3d Cir. 2005). The language does not *exclude* qualifying conduct merely because it also relates to a security interest; on the contrary, the statute unequivocally *includes* the extra behavior ("such term *also includes*"). See *Mount Lemmon Fire Dist.* v. *Guido*, 139 S. Ct. 22, 25 (2018) ("'also' is a term of enhancement; it means 'in addition; besides' and 'likewise; too'"). And that fits Congress's apparent objectives: If the conduct falls within the main definition, it is

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Resp. Br. 34. That defines *what* kind of debts are "debts owed"; it does not define *from whom* the payments can be obtained. Respondent's proposed loophole has no support in the statute.

[8] Respondent argues that, under petitioner's reading, even a pawn shop would be considered a debt collector. Br. 34-35. This misses the mark. First, a pawn shop is usually the *original creditor*, so it escapes coverage for that reason. Second, when a pawn shop sells collateral by a date-certain, it is not engaging in any further communication with the consumer; it is simply disposing of the collateral. So even if the action constitutes "debt collection" (because it is satisfying the debt), the actual conduct is not covered by the FDCPA—absent interaction with the consumer, the FDCPA's substantive prohibitions remain unactivated. Finally, if the pawn shop does give advanced warning that it will sell the watch ("pay by Friday or I sell"), it is indeed engaged in obvious debt collection.

subject to the full Act, and nothing in the language says otherwise. It makes little sense to exclude activity Congress saw reason to regulate merely because it also involves a security interest.

Respondent also suggests its understanding "accords with ordinary usage" (Br. 18), but that is wrong. Respondent's "Vice President" example works only because the Vice President cannot also be a sitting Senator; the two offices are mutually exclusive. Here, by contrast, one can both collect a debt *and* enforce a security interest. And as for respondent's "veteran" example (Br. 18), surely respondent is not suggesting that a veteran in "active service" who is *also* a "surviving spouse" is thereby excluded from qualifying as a "veteran" for all purposes. Respondent's example thus proves *petitioner's* point.

b. Respondent and the government respond that this plain-text reading renders the additional definition surplusage. This is baseless. Tellingly, neither addresses the definition's most obvious and common application: "repo" agents who do nothing more than show up in the middle of the night and tow a car back to the creditor's premises.

Those people have one role in the process, and their conduct is policed by a single subsection that has direct application to their conduct—ensuring they do not take property without permission or make unlawful threats. 15 U.S.C. 1692f(6). That activity does not implicate any of the Act's broader concerns. There is no negotiation or requests for payment. Indeed, the entire goal of most repossessions is to avoid contact entirely. The agent's job is not to try one last time to collect the debt or even provide a final warning to pay while waiting outside by the car. The agent shows up, takes the car, and returns it to the creditor. *E.g.*, *James* v. *Ford Motor Credit Co.*, 47 F.3d 961,

962-963 (8th Cir. 1995). There is no overlap with the FDCPA's main definition.[9]

The government, however, argues that even this limited activity would qualify as full "debt collection" under the FDCPA, because the U.C.C. requires creditors to warn debtors before selling repossessed cars. Br. 27.

But the government ignores what the U.C.C. actually says. It does not require *the same person who takes the car* to notify the debtor. On the contrary, it puts that burden on the "secured creditor." U.C.C. § 9-611(b). And, indeed, it stands to reason that the person towing the car or changing the locks is not the same person trying to liquidate the car (or re-rent the apartment) to pay the debt. The government simply assumes—without any obvious foundation—that the "repo man" (and not the creditor or other specialized entity) is the one sending the *post*-repossession notices.

And the government's argument even fails on its own terms. It most assuredly *is* debt collection for an entity to demand payment one last time before selling the car. See U.C.C. § 9-608(a) (explaining that the security interest "secures payment or performance of an obligation," and authorizing "cash proceeds" to "satis[fy]" the "obligation secured by the security interest"); U.C.C. § 9-614 ("[y]ou can get the property back at any time before we sell it by paying us the full amount you owe"). So if the "repo" agent decides to send the notice on their own, they indeed qualify under the Act's main definition and must comply with

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[9] Indeed, the scope of Section 1692f(6) further reaffirms the plain-text reading of the statute. Traditional "repos"—taking cars in the middle of the night—match perfectly with "dispossession or disablement." It is little wonder that the single subsection applied to "security enforcers" also happens to exactly mirror traditional "repo" activity. This shows the obvious scope that Congress had in mind for the additional definition.

the Act's full prohibitions (including the requirements that they correctly state the amount owed, avoid demanding unauthorized charges, etc.).

c. According to the government, petitioner's reading artificially restricts the FDCPA's additional definition to a "cryptic euphemism for one specific form of self-help," even though the definition's text naturally applies to "enforcement" of all "security interests." Br. 29. The government is confused.

No one says that non-judicial foreclosure is not the "enforcement of a security interest." The point is that it is not *only* the enforcement of a security interest. A foreclosure *does* qualify as security enforcement, but it *also* qualifies as debt collection. And the statute nowhere says that all enforcement-related conduct is immune from regulation if it *also* qualifies under the main definition ("collecting or attempting to collect, directly or indirectly, debts owed").

So petitioner's point is not that the additional definition is artificially limited; his point is that the additional definition is not rendered surplusage (or anything close) due to the entire industry of repossession agents who qualify "solely" under narrower definition.

d. Respondent argues that its interpretation is consistent with the common law's distinction between "in rem" and "in personam" actions. Br. 21.

The short answer is that if Congress wanted to strictly adhere to those categories, it would have copied over those terms into the FDCPA. But that is plainly not what Congress did. It broadly defined debts to included "any" obligation, not just unsecured obligations. 15 U.S.C. 1692a(5). It specifically covered actions to enforce real-property interests. 15 U.S.C. 1692i. And it expressly referenced mortgage debts in the key legislative history. Pet. Br. 23-24. There is no ground for creating a huge loophole

in the Act for in rem proceedings. *E.g.*, *Kaymark* v. *Bank of Am., N.A.*, 783 F.3d 168, 179 (3d Cir. 2015).

Respondent briefly suggests a similar parallel to bankruptcy law. Br. 21 n.4. But this parallel is not parallel at all. The different treatment of secured and unsecured debts is a direct product of the Bankruptcy Code itself. It textually draws those distinctions and does so for policy reasons, balancing the competing interests of debtors and creditors. *Johnson* v. *Home State Bank*, 501 U.S. 78, 82-84 (1991). Indeed, if anything, the Code shows that Congress knows exactly how to exclude secured interests from general provisions (like the Code's discharge) when it so wishes.

3. Respondent argues that its position is consistent with the government's past enforcement position (Br. 23-24), but that is wrong. First, the FTC's formal staff commentary directly supports *petitioner*. It confirms that parties who enforce security interests but *also* "otherwise fall within the [main] definition" are indeed subject to the FDCPA's full scope. 53 Fed. Reg. 50,097, 50,108 (Dec. 13, 1988). More importantly, the same commentary also confirms that the Act covers "a party who is named as a debtor's trustee solely for the purpose of *conducting a foreclosure sale* (i.e., exercising a power of sale in the event of default on a loan)." *Id.* at 50,103 (emphasis added). That describes this issue exactly—and the FTC's position is impossible to square with respondent's position.

Moreover, while the FTC's informal staff letter does suggest an exclusion for state-mandated notices (Resp. Br. 23-24), the staff's opinion was divorced from the text, contained no real analysis of any kind, and failed to justify the proposed exclusion. See Federal Trade Commission, Staff Opinion Letter, 1992 WL 12622329, at *2-*4 (Oct. 8,

1992). Just as in *Heintz*, "nothing either in the Act or elsewhere indicat[es] that Congress intended to authorize the FTC to create this exception from the Act's coverage—an exception that * * * falls outside the range of reasonable interpretations of the Act's express language." *Heintz*, 514 U.S. at 298.

Finally, while the Bureau of Consumer Financial Protection now supports respondent, its flip-flop is entirely unconvincing. The Bureau acknowledged its past contrary position in *Ho* (U.S. Br. 22 n.6), but (inexplicably) ignores *eight years* of consistently supporting petitioner's position. Indeed, the Bureau had adopted the opposite position before two other circuits (the Second and Eleventh), and repeated the same position in its statutorily required 2013 annual report (see 15 U.S.C. 1692m(a); see also Consumer Financial Protection Bureau, *Fair Debt Collection Practices Annual Report 2013* 27-28 (Mar. 20, 2013)).

Until this case, the Bureau had long recognized the essential need to protect consumers from misconduct and mistakes in the foreclosure context. The government was right before; it is wrong now.

B. The FDCPA's Context And Purpose Confirm That Non-Judicial Foreclosure Is Subject To The Act

The FDCPA's context and purpose reaffirm that nonjudicial foreclosure qualifies as debt collection. Pet. Br. 21-23.

1. As petitioner already explained, Section 1692i confirms that Congress understood foreclosures were subject to the Act's general provisions. Pet. Br. 21. Respondent's response (Br. 37-38) wholly misses the point.

First, under its plain language, Section 1692i establishes that an "action to enforce an interest in real property" *is* "an[] action on a debt." 15 U.S.C. 1692i(a)(1) (emphasis added). Congress thus understood foreclosures were not merely targeting security interests, but in fact

targeting the underlying debt itself. Congress did not have to repeat the phrase "debt collection" to make its intention clear. *E.g.*, *Cohen* v. *Rosicki & Assocs., P.C.*, 897 F.3d 75, 83 (2d Cir. 2018).

Moreover, respondent overlooks that Congress also did not repeat "debt collection" in Section 1692i(a)(2), which most certainly covers the heartland of collection activities (including actions on a "contract"). The fact that Congress introduced both categories with the same prefatory language—"Any debt collector who brings any legal action on a debt against any consumer"—shows that Congress saw an obvious equivalence between the two types of actions. And it described each one, again, as an "action on a debt," not mere security enforcement.

Finally, it is does not matter whether non-judicial foreclosures are technically subject to this provision. Contra U.S. Br. 31-32. What matters is that Congress understood *foreclosures* as debt collection—which is why they were regulated under the Act's general prohibitions.[10]

2. Respondent and its amici repeatedly suggest that there is no real need for the FDCPA in the foreclosure context. But the urgent role for the Act is compelling and obvious.

Respondent simply ignores the long history of misconduct in the foreclosure arena. As noted above, the area has been subject to documented abuse. Foreclosure mills have inflated fees, charged unauthorized amounts, and even targeted the wrong people (while foreclosing on the wrong house). See also, *e.g.*, Katherine Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, 87 Tex. L. Rev. 121, 126 (2008) ("Errors or overcharges increase the cost of home ownership and expose families to the risk of

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[10] In any event, *Shapiro* already held that Colorado non-judicial foreclosures are indeed covered by the FDCPA. 823 P.2d at 124.

wrongful foreclosure."). State laws have not been a perfect cure or deterrent to these problems. Indeed, Colorado itself has recently targeted the biggest Colorado debt-collection firms for their abuse and errors in processing non-judicial foreclosures. See p. 5 n.1, *supra*.

Congress enacted the FDCPA to create a federal baseline to protect consumers from precisely these kinds of mistakes. See, *e.g.*, 15 U.S.C. 1692e(2); 15 U.S.C. 1692f(1). The procedures in place to validate debts (15 U.S.C. 1692g) encourages accuracy, and the Act's substantive prohibitions discourage and remedy abuse. If respondent and their amici truly believe that the FDCPA's safeguards are unnecessary in the one context with the greatest possible effect on families and communities, their proper audience is Congress, not the courts.

C. The FDCPA's Legislative History Further Confirms That Non-Judicial Foreclosure Qualifies As Debt Collection

The FDCPA's legislative history confirms what its text already makes clear: foreclosures are covered by the FDCPA.

First, respondent has no answer for why Congress would specifically discuss mortgages without mentioning that it was silently excluding the primary means of obtaining payment when mortgage debt goes into default. See Pet. Br. 23-24. If Congress did indeed intent to exclude foreclosures from the Act, one would expect to see some commentary, somewhere, to that effect. And that is especially so where one of the enacted provisions (Section 1692i) directly targets foreclosure proceedings. Respondent has no explanation for why this particular dog did not bark.

Second, respondent suggests that the FDCPA was a product of compromise that left security enforcers (how-

ever they might otherwise qualify under the main definition) subject "only" to the "limited" focus of Section 1692f(6). Br. 25-26. The clear legislative compromise, however, was *not* to exempt security enforces who are *also* debt collectors; it was to include those who *only* enforce security interests but subject them solely to one subsection (not every subsection) of the Act. That compromise reflects the differences between the bills and (more importantly) reads the *enacted* text to mean what it so plainly says. Respondent's contrary speculation cannot account for the final bill's actual language.

Finally, respondent argues that Congress was obviously not focused on foreclosures because it mentioned many States with "'no debt collection laws,'" whereas *every* State had laws regulating foreclosures. Br. 26-27.

Respondent plainly misreads this statement. The legislative commentary focused on laws "regulating debt collection per se." H.R. Rep. No. 131, 95th Cong., 1st Sess. 3 (1977). There is an obvious difference between a scheme targeting debt collectors *as such* and one incidentally regulating activity where debt collectors may practice. Every State, for example, presumably also had laws prohibiting assault and mail fraud, but no one confuses those prohibitions with a debt-collector-specific code of conduct. Congress pointed out the absence of the latter, not the former.

As the legislative history made clear, Congress targeted debt-collection misconduct in its many forms; there is no indication that it felt foreclosures—the area, again, with potentially the most devastating effect on American consumers and families—should fall outside its baseline consumer protections.

D. The FDCPA Does Not Intrude In Any Meaningful Way On Any Legitimate State Interest

According to respondent, mortgage foreclosure is a traditional state interest, and the FDCPA does not contain a sufficiently clear directive to displace state law in this area. Br. 40-49. Respondent is wrong.

1. Contrary to respondent's contention, this is not a core area of traditional state concern. Foreclosures implicate core economic transactions typically involving national banks and enormous implications for interstate commerce—which presumably explains Congress's heavy regulation in this very area (including RESPA, TILA, the Bankruptcy Code—and, in fact, the FDCPA (see 15 U.S.C. 1692i)). It is odd to presume that Congress decided to draw the line at the State's interest in non-judicial foreclosure (at least for those States using the procedure).[11]

Respondent's contrary position overreads this Court's decisions. In *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531 (1994), for example, the Court did not hold that foreclosure per se was a traditional state interest; instead, it endorsed "the essential sovereign interest in the security and stability of title to land." 511 U.S. at 545 n.8. The FDCPA does not interfere with that interest at all; it does not permit courts to enjoin foreclosures or unwind transactions. It simply requires professional debt collectors to honor a baseline set of acceptable practices.

And, in any event, to the extent a clear statement is required to "intrude" in this area, Congress was emphatically clear in targeting a broad range of debts and

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[11] While the presence of federal regulation does not necessarily imply the absence of a state interest (Resp. Br. 46), when an area is already covered by an extensive network of federal regulation, it surely cuts against the presumption that Congress embraced a hands-off approach.

preempting any contrary state laws. See 15 U.S.C. 1692n. It is odd for respondent and the government to insist upon a clearer statement in an Act with that kind of express preemption provision.[12]

2. In any event, respondent's asserted conflicts are weak, overstated, and unproven.

Initially, for all the claims of chaos, there has been no obvious effect on any State's foreclosure system. Neither respondent nor any of their amici could document any true interference, despite the FDCPA's applicability in this context for years in multiple jurisdictions. If the two systems were truly incompatible, one would expect to see foreclosure systems grind to a halt. Instead, actual "[e]xperience suggests otherwise." *Mount Lemmon*, 139 S. Ct. at 27.

Moreover, despite all the claimed conflicts, the list of complaints reduces to a small handful of basic provisions, each with a number of easy outs.

First, parties can overcome consent requirements to publication and personal service (15 U.S.C. 1692c) by securing an agreement (in the original grant) to provide all necessary consents in the event of foreclosure. And if parties resist such a provision, the foreclosure can still proceed in line with state law on "the express permission of a court of competent jurisdiction." *Ibid.* Courts issue warrants all the time, and Colorado itself already has a judicial procedure in place for Rule 120 hearings. At the very most, these minimal burdens would provide consumers a

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[12] Nor is *Sheriff* v. *Gillie*, 136 S. Ct. 1594 (2016), to the contrary. That case involved the State's own activities in collecting its own debts, not state regulation of third parties in core economic transactions. See 136 S. Ct. at 1602.

modicum of judicial review (to ensure accuracy and fairness) before publicizing their defaults to their friends and neighbors.

Second, debt collectors are permitted to invoke available procedures even where consumers refuse further communication. *Heintz* so held in a related context (514 U.S. at 296-297), and respondent offers no reason the same solution is unworkable here.

Third, the debt-validation process (15 U.S.C. 1692g) requires minimal information to confirm that the claimed default is accurate and the alleged creditor is legitimate. Any party seeking to take away someone's house ought to have this information available *before* starting the process; there is no reason that assembling this basic information should prove insurmountable.

Finally, if Congress finds these tiny inconveniences too much, it can always amend the FDCPA—as it has repeatedly done in the past—to exempt foreclosure notices and publications from the Act's scope. Cf. 15 U.S.C. 1692e(11), 1692g(d). That type of precision amendment makes more sense than tossing out the entirety of the FDCPA to avoid a few marginal (and highly debatable) conflicts. Respondent is wrong to pick up a sledgehammer when a scalpel will do.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

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DECEMBER 2018

No. 17-1307

In the Supreme Court of the United States

DENNIS OBDUSKEY, PETITIONER

v.

MCCARTHY & HOLTHUS LLP, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

The Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. 1692 *et seq.*, imposes various requirements on "a debt collector * * * in connection with the collection of any debt." 15 U.S.C. 1692c(a); see 15 U.S.C. 1692c-1692g. The FDCPA generally defines "debt collector" (with various exceptions) as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. 1692a(6). Debt collectors who fall within that general definition are subject to all of the FDCPA's requirements for debt collectors. The Act also contains a limited-purpose definition of "debt collector," which provides that, "[f]or the purpose of section 1692f(6) of this title, [the] term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests." *Ibid.* The question presented is as follows:

Whether enforcement of a security interest in property through a state-law nonjudicial-foreclosure process constitutes debt collection for all purposes under the FDCPA.

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AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

The Fair Debt Collection Practices Act (FDCPA or Act), 15 U.S.C. 1692 *et seq.*, authorizes the Bureau of Consumer Financial Protection (Bureau) to "prescribe rules with respect to the collection of debts by debt collectors, as defined in [the FDCPA]." 15 U.S.C. 1692*l*(d). The Bureau, the Federal Trade Commission (FTC), and other federal agencies are responsible for enforcing the Act through administrative proceedings and civil litigation. 15 U.S.C. 1692*l*(a)-(c). The United States therefore has a substantial interest in the Court's resolution of the question presented.

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in the appendix to this brief. App., *infra*, 1a-28a.

STATEMENT

1. a. Congress enacted the FDCPA to address "the use of abusive, deceptive, and unfair debt collection practices by many debt collectors." Pub. L. No. 95-109, § 802(a), 91 Stat. 874 (15 U.S.C. 1692(a)). Congress concluded that "[m]eans other than misrepresentation or other abusive debt collection practices [we]re available for the effective collection of debts," and "[e]xisting laws and procedures * * * [we]re inadequate to protect consumers." 15 U.S.C. 1692(b) and (c). The Act's "purpose[s]" include "eliminat[ing] abusive debt collection practices by debt collectors" and "insur[ing] that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." 15 U.S.C. 1692(e).

The FDCPA pursues those purposes primarily by imposing various requirements on the activities of "debt collector[s]" "in connection with the collection of [a] debt." 15 U.S.C. 1692c(a); see 15 U.S.C. 1692c-1692h. Among other things, the Act restricts debt collectors' communications with consumers and third parties "in connection with the collection of any debt," 15 U.S.C. 1692c(a) and (b); prohibits them from "harass[ing], oppress[ing], or abus[ing] any person," or from making "false, deceptive, or misleading representation[s]," "in connection with the collection of any debt," 15 U.S.C. 1692d, 1692e; and bans their use of "unfair or unconscionable means to collect or attempt to collect any debt," 15 U.S.C. 1692f. It also requires a debt collector seeking to collect a debt promptly to provide the consumer certain information about the debt, 15 U.S.C. 1692g(a), and to "cease collection of the debt" if the consumer "dispute[s]" the debt, until the debt collector provides verification of the debt. 15 U.S.C. 1692g(b).

b. Consistent with its focus on protecting "consumer[s]" from certain abuses, 15 U.S.C. 1692(b), the FDCPA does not apply to all "debts" or "debt collectors" in a colloquial sense. It defines "debt" to include only "an[] obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes." 15 U.S.C. 1692a(5). Commercial debts thus are not covered.

Similarly, the FDCPA's provisions do not apply to every person who might colloquially be described as collecting a debt. The Act does not define "collection," but it contains two definitions of "debt collector," 15 U.S.C. 1692a(6), both subject to an array of exclusions, see 15 U.S.C. 1692a(6)(A)-(F). First, Section 1692a(6) states that "'debt collector' means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. 1692a(6). Second, Section 1692a(6) further states that, "[f]or the purpose of section 1692f(6) of this title, [the] term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests." *Ibid.* Section 1692f(6) prohibits debt collectors from "[t]aking or threatening to take any nonjudicial action to effect dispossession or disablement of property" if the debt collector lacks a "present right to possession * * * through an enforceable security interest," if it does not actually "inten[d]" to take possession, or if the property is "exempt." 15 U.S.C. 1692f(6)(A).

Taken together, these two definitions establish that a person engaged in a business whose principal purpose is enforcing security interests generally falls outside the Act, except that the person is deemed to be a debt collector for purposes of Section 1692f(6). The FDCPA permits such a person to take collateral pursuant to a security interest, so long as applicable law permits doing so and the person does not make false threats.

c. The FDCPA does not define "security interest[]." In ordinary usage, the term refers to a property interest given to a creditor to secure a debt—typically a right to take or compel the sale of property that the consumer has pledged as collateral if the consumer does not pay the debt. See, *e.g.*, *Black's Law Dictionary* 1217 (5th ed. 1979) (*Black's Fifth*) ("A form of interest in property which provides that the property may be sold on default in order to satisfy the obligation for which the security interest is given."); *Black's Law Dictionary* 1562 (10th ed. 2014) (*Black's Tenth*) (similar).

Security interests are generally governed by state law. See, *e.g.*, *Butner* v. *United States*, 440 U.S. 48, 55-57 (1979). Security interests in personal property are addressed by Article 9 of the Uniform Commercial Code (U.C.C.), which every State has adopted in some form. See William H. Henning & Fred H. Miller, 66 No. 4 U.C.C. Bulletin 1, *Report on the UCC: 2008—Part 1* (Jan. 2009). Security interests in real property are known as mortgages. See *Black's Fifth* 1217; 2 Baxter Dunaway, *Law of Distressed Real Estate* § 15:1 (May 2018 update) (Dunaway).

If a debtor defaults on a mortgage debt, the ordinary method of enforcing the security interest is "[f]oreclosure," *i.e.*, "the process in which property securing a mortgage is sold to pay off the loan balance due." 2 Dunaway § 15:1; see Restatement (Third) of Property

(Mortgages) § 8.2 (1997) (Restatement). State foreclosure laws vary, but two general types exist. 2 Dunaway § 16:1; see *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 541-542 (1994). First, every State permits "judicial" foreclosure, which requires a creditor to initiate a court action and obtain a court order to foreclose on the secured property. See 2 Dunaway § 16:1. The debtor and other interested parties are typically named as defendants. *Id.* § 16:3. Following a sale, most States permit the creditor to obtain a deficiency judgment against the debtor for any remaining balance. See National Consumer Law Center, *Foreclosures and Mortgage Servicing* § 12.3.2 (5th ed. 2014) (NCLC).

Second, most States additionally permit "nonjudicial foreclosure," also called "power of sale foreclosure," "foreclosure by advertisement," or a "trustee's sale." 2 Dunaway § 17:1; see *id.* App. 17A (listing States). Nonjudicial foreclosures typically enable a creditor to initiate "a public sale of the property" without "utiliz[ing] court proceedings to conduct the foreclosure sale unless the lender wants to obtain a deficiency judgment" for any shortfall that remains after the property has been sold. *Id.* §§ 16:1, 17:1. Where nonjudicial foreclosure is available, "it is normally the preferred method of foreclosure because, in most instances, the process is less costly and time-consuming than judicial foreclosure." *Id.* § 16:1. In many States, however, creditors who elect nonjudicial foreclosure waive or limit their ability to obtain a deficiency judgment against the debtor for any shortfall. See *ibid.*; see also NCLC § 12.3.2.

"State non-judicial foreclosure statutes typically set out both substantive and procedural requirements for conduct of a foreclosure sale," and "[c]ompliance with these requirements is necessary to complete a valid sale"

and "to extinguish the borrower's interest in the property." NCLC § 7.5.1; see 2 Dunaway § 17:2. These requirements limit who may initiate nonjudicial foreclosure and typically include procedural protections that govern "serving and recording pre-sale notices, placing advertisements, serving and recording notices of sale, and conducting the sale." NCLC § 7.5.1; see 2 Dunaway § 17:1. A creditor ordinarily may pursue nonjudicial foreclosure only if the mortgage instrument contains a "power of sale clause" granting it the authority to initiate such a sale. 2 Dunaway § 17:2. A common practice is to vest the security interest in a third-party trustee; when trustees are used, the instrument granting the power of sale is called a "deed of trust." Restatement § 8.2 cmt. a.

2. This case involves a real-property security interest under Colorado law, which generally permits a creditor who holds a deed of trust to "foreclose on [a] lien either through a judicial or a non-judicial foreclosure." 13 Debra Knapp, *Colorado Practice Series, Civil Procedure Forms and Commentary* § 120.1 (2d ed. 2005). In a judicial foreclosure, such a creditor may "obtain[] a complete adjudication of the rights of all parties thereto, with respect to any real property and for damages, if any, for the withholding of possession," and "[t]he court in its decree shall grant full and adequate relief so as to completely determine the controversy and enforce the rights of the parties." Colo. R. Civ. P. 105(a).

Colorado's "nonjudicial" foreclosure process is a misnomer because a court order is required to conduct the foreclosure sale. But it does not entail a full-blown, trial-type proceeding that adjudicates all of the parties' claims (as in judicial foreclosures). And the creditor cannot obtain a deficiency judgment in the foreclosure proceeding for any debt remaining after the sale. Pet. App. 8a-9a.

For residential mortgages, Colorado's nonjudicial-foreclosure process typically begins when the creditor or its agent sends the debtor certain statutorily required contact information for Colorado's foreclosure hotline and the creditor's loss-mitigation department. Colo. Rev. Stat. § 38-38-102.5 (2017). Thirty days thereafter, the creditor may initiate foreclosure proceedings by filing a "notice of election and demand" with the public trustee for the county where the property is located. *Id.* § 38-38-101. The public trustee is a state official appointed by the governor. *Id.* §§ 38-37-101, 38-37-102. The public trustee is responsible for recording the notice of election and demand and mailing notices to the debtor providing information about the debtor's rights to cure the default and the foreclosure sale's date and location. *Id.* §§ 38-38-101(14), 38-38-102, 38-38-103. Notices are also mailed to interested parties and must be published in a local newspaper. *Id.* §§ 38-38-100.3(19), 38-38-103(5).

If the debtor does not cure the default or declare bankruptcy, a creditor holding a deed of trust may file a verified motion in court for an order authorizing sale of the property. Colo. Rev. Stat. §§ 38-38-104, 38-38-105(b), 38-38-109(s) (2017); Colo. R. Civ. P. 120(a). The creditor must serve the debtor and other interested parties with notice of the motion and the hearing date, and any interested person who disputes the grounds for the motion may file a response. Colo. R. Civ. P. 120(b) and (c). The court will then hold a hearing to determine whether to order the sale. Colo. R. Civ. P. 120(d).

If the court authorizes the sale, the public trustee or sheriff may sell the property at a public auction. Colo. Rev. Stat. § 38-38-110 (2017). The court "shall require a return of sale" to be filed and "shall enter an order approving the sale" if it was "conducted in conformity with

the [court's] order." Colo. R. Civ. P. 120(g). Once the proceeds are distributed to lienholders, "any remaining overbid" is "paid to the owner." Colo. Rev. Stat. § 38-38-111 (2017). If the sale proceeds are insufficient to pay off the debt, the creditor cannot recover the balance due in the same proceeding, but must file a separate suit against the debtor. See *id.* § 38-38-106(6); *Bank of Am.* v. *Kosovich*, 878 P.2d 65, 66 (Colo. App. 1994).

3. In 2007, petitioner borrowed $329,940 to buy a home in Colorado, which served as security for the loan. Pet. App. 2a; see J.A. 37. Wells Fargo Bank, N.A., serviced the loan. Pet. App. 2a. In 2009, petitioner defaulted. *Ibid.*

In 2014, Wells Fargo hired respondent McCarthy & Holthus LLP (McCarthy), a law firm, to foreclose on the property. Pet. App. 2a. McCarthy sent petitioner an undated letter stating that it had been "instructed to commence foreclosure." J.A. 37. The letter further stated that McCarthy "may be considered a debt collector attempting to collect a debt" and would "assume this debt to be valid unless [petitioner] dispute[d]" it within 30 days, in which case McCarthy would send verification of the debt to petitioner. J.A. 37-38 (capitalization omitted). In a separate undated letter, McCarthy provided petitioner the required contact information for Colorado's foreclosure hotline and McCarthy's loss-mitigation representatives. See J.A. 42-43. In August 2014, petitioner wrote to McCarthy disputing the debt and requesting verification, directing McCarthy to "cease all unauthorized contact" about the debt pursuant to 15 U.S.C. 1692c(c), and stating that he was represented by counsel. C.A. Supp. App. 124-125.

McCarthy did not provide petitioner verification of the debt. See Pet. App. 2a. Instead, in May 2015, it commenced a nonjudicial-foreclosure proceeding under Colorado law by filing with the public trustee a "notice of election and demand for sale." J.A. 39 (capitalization and emphasis omitted). The notice stated that Wells Fargo had "elected to accelerate the entire indebtedness" secured by the deed of trust and directed the trustee to "sell [the] property for the purpose of paying the indebtedness thereby secured." J.A. 39-40. It also stated that McCarthy "may be considered a debt collector attempting to collect a debt." J.A. 40 (capitalization omitted).

4. a. Petitioner filed this action against McCarthy and Wells Fargo, asserting claims in part under the FDCPA. Pet. App. 2a-3a, 16a. The district court dismissed the suit, concluding that "the FDCPA does not apply to non-judicial foreclosures" because "foreclosure proceedings are not a collection of a debt" within the meaning of the FDCPA. *Id.* at 20a-21a.

b. The court of appeals affirmed. Pet. App. 1a-13a. As relevant here, the court concluded that, although petitioner had "sufficiently pled that McCarthy failed to verify [petitioner's] debt after it was disputed, in violation of [15 U.S.C.] 1692g," McCarthy "[wa]s not a debt collector for purposes of the FDCPA" when it initiated the nonjudicial-foreclosure proceeding because "McCarthy's mere act of enforcing a security interest through a non-judicial foreclosure proceeding does not fall under the FDCPA." *Id.* at 5a, 12a. The court reasoned that "enforcing a security interest is not an attempt to collect money from the debtor, and the consumer has no obligation . . . to pay money." *Id.* at 7a (citation and internal quotation marks omitted). It observed that

nonjudicial foreclosures differ in an "obvious and critical" respect from judicial foreclosures: they "do[] not preserve to the trustee the right to collect any deficiency in the loan amount personally against the mortgagor." *Id.* at 8a (citations omitted). The court also expressed concern that, "[i]f the FDCPA applied to non-judicial foreclosure proceedings in Colorado, it would conflict with Colorado mortgage foreclosure law." *Id.* at 10a. It rejected the argument that a contrary reading is compelled by 15 U.S.C. 1692i, "a venue provision" for "'any legal action on a debt'" by a debt collector "'against any consumer.'" Pet. App. 9a (citation omitted). The court reserved judgment on whether "more aggressive collection efforts leveraging the threat of foreclosure into the payment of money" would "constitute 'debt collection'" under the Act. *Id.* at 11a.

SUMMARY OF ARGUMENT

Initiating a nonjudicial-foreclosure proceeding generally does not constitute debt collection under the FDCPA.

A. The FDCPA's text and structure make clear that enforcement of a security interest, without more, is not debt collection except for purposes of one of the Act's provisions. The Act creates a two-tiered framework that defines two types of "debt collector" and imposes different obligations on each type. 15 U.S.C. 1692a(6). The Act's general definition of "debt collector" includes businesses whose "principal purpose" is the "collection of any debts." *Ibid.* Persons who meet the general definition (and are not otherwise excluded) are subject to all of the Act's requirements. A separate definition covers businesses whose principal purpose is the "enforcement of security interests," but only "[f]or the purpose of" Section 1692f(6). *Ibid.* It follows that enforcing a security interest, by itself, is not debt collection, except for purposes of

Section 1692f(6). Otherwise, the additional, limited-purpose definition of debt collector would be superfluous.

That reading comports with the FDCPA's purposes. The Act's express objective is to protect consumers from certain types of abusive practices. Congress reasonably determined that enforcing security interests in accordance with applicable law does not present the same risks as demanding payment from debtors directly. The enforcement of security interests has long been subject to an extensive body of state law that provides substantial safeguards. Section 1692f(6) itself reflects that Congress did not view enforcing security interests in general as posing a concern. Respecting the distinction Congress drew between collecting debts and enforcing security interests is also consistent with *Heintz* v. *Jenkins*, 514 U.S. 291 (1995). *Heintz* did not address whether enforcing a security interest is debt collection. It held only that the Act does not exempt lawyers engaged in litigation if their acts otherwise constitute debt collection.

B. McCarthy did not engage in debt collection by initiating a nonjudicial-foreclosure proceeding under Colorado law. Actions that are legally required to enforce a security interest are not debt collection under the FDCPA—except for purposes of 15 U.S.C. 1692f(6), which is not at issue here. Nonjudicial foreclosure is "the enforcement of [a] security interest[ ]," 15 U.S.C. 1692a(6), and filing a notice with a public trustee is undisputedly a necessary step in that process in Colorado. Deeming such activities debt collection could bring the FDCPA into conflict with state law and effectively preclude compliance with state foreclosure procedures. No sound basis exists to assume Congress intended that result.

C. Petitioner's contrary arguments lack merit. His principal contention that foreclosure *also* constitutes a

direct and indirect attempt to collect a debt proves far too much. On that view, all security-interest enforcement would likewise appear to be debt collection, rendering the additional definition of "debt collector" superfluous. Petitioner errs in contending (Br. 25) that the additional definition can be saved from superfluity by reading it to reach only "classic 'repo' activity." That ad hoc interpretation has no grounding in the statute and does not avoid surplusage in any event. Nor does the FDCPA's venue provision, 15 U.S.C. 1692i, classify all foreclosure as debt collection. And the fact that the FDCPA does not categorically exclude foreclosure reflects that persons who undertake nonjudicial foreclosure or other methods of security-interest enforcement are debt collectors for purposes of Section 1692f(6).

ARGUMENT

ENFORCEMENT OF A SECURITY INTEREST THROUGH A NONJUDICIAL FORECLOSURE GENERALLY IS NOT DEBT COLLECTION UNDER THE FDCPA

The FDCPA's requirements generally apply only to a "debt collector" engaged in activities "in connection with the collection of any debt." 15 U.S.C. 1692c(a); see 15 U.S.C. 1692c-1692g. The question here is whether McCarthy engaged in debt collection triggering the FDCPA provisions at issue when it initiated a nonjudicial foreclosure against petitioner's property. It did not. The FDCPA draws a critical distinction between collecting debts and enforcing security interests. The statute's text and structure make clear that enforcement of a security interest, without more, is not debt collection except for purposes of 15 U.S.C. 1692f(6), which is not at issue in this case. Initiating a nonjudicial-foreclosure proceeding in accordance with state law undisputedly constitutes enforcement of a security interest. The

court of appeals therefore correctly concluded that initiating nonjudicial foreclosure is not debt collection for purposes of the FDCPA provisions at issue.

A. Enforcement Of A Security Interest, Without More, Generally Is Not Debt Collection Under The FDCPA

The FDCPA does not define the "collection" of a debt. Its text and structure make clear, however, that enforcement of a security interest by itself generally is not debt collection. That conclusion comports with the Act's purposes and this Court's precedent.

1. The FDCPA's text establishes a two-tiered framework by defining two types of "debt collector" and imposing different statutory requirements on each. First, Section 1692a(6)'s opening sentence establishes a general definition stating that "'debt collector' means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. 1692a(6). A person who meets that general definition (and is not otherwise excluded) is subject to all of the FDCPA's provisions.

Second, Section 1692a(6)'s third sentence sets forth an additional definition of "debt collector" that applies *only* for purposes of one FDCPA provision.[1] It states that, "[f]or the purpose of section 1692f(6) of this title,

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[1] The second, intervening sentence clarifies that, "[n]otwithstanding" the exclusion in paragraph (F), "debt collector" does "include[] any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts." 15 U.S.C. 1692a(6).

such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests." 15 U.S.C. 1692a(6). Section 1692f prohibits "debt collector[s]" from "us[ing] unfair or unconscionable means to collect or attempt to collect any debt." 15 U.S.C. 1692f. Subsection (6) makes it "a violation" of that prohibition to "[t]ak[e] or threaten[] to take nonjudicial action to effect dispossession or disablement of property" if the debt collector lacks a "present right to possession of the property claimed as collateral through an enforceable security interest," if "there is no present intention to take possession of the property," or if "the property is exempt by law from such dispossession or disablement." 15 U.S.C. 1692f(6). A person who meets Section 1692a(6)'s additional definition, but not the general definition, is a debt collector *only* for purposes of Section 1692f(6) and is subject only to that provision's requirements.

It follows from those two definitions that enforcement of a security interest, standing alone, generally is not debt collection under the FDCPA. It is debt collection only for the limited purpose of Section 1692f(6). Section 1692a(6)'s third sentence, which states that the term "debt collector" "also includes" businesses whose principal purpose is "the enforcement of security interests," establishes an additional definition. See *Mount Lemmon Fire Dist.* v. *Guido*, No. 17-587 (Nov. 6, 2018), slip op. 4 ("'also'" in statutory definition "is a term of enhancement; it means 'in addition; besides' and 'likewise; too'" (citation omitted)). That additional definition expands the term's meaning beyond what the first sentence's general definition covers.

A contrary reading would "flout[] the rule that 'a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous.'" *Clark* v. *Rameker*, 134 S. Ct. 2242, 2248 (2014) (citation omitted). If "enforcement of security interests" were a form of debt collection, there would have been no reason for Congress to have enacted that additional definition: every person who met the additional definition would necessarily *also* satisfy the general definition, rendering the additional definition superfluous. Courts are loath to read a statute to render a definition "unnecessary." *Roberts* v. *Sea-Land Servs., Inc.*, 566 U.S. 93, 110 (2012). Congress's inclusion of both definitions shows that it viewed enforcement of security interests and debt collection to be distinct.

The FDCPA's structure powerfully confirms that conclusion. Congress limited the additional definition of "debt collector" to *one* FDCPA provision, Section 1692f(6). As the FTC's staff explained in commentary thirty years ago, because the FDCPA's definition of debt collector "includes parties whose principal business is enforcing security interests only for [Section 1692f(6)] purposes, such parties (if they do not otherwise fall within the definition) are subject only to this provision and not to the rest of the FDCPA." 53 Fed. Reg. 50,097, 50,108 (Dec. 13, 1988). Construing "enforcement of security interests" to be a form of debt collection, however, would nullify Congress's decision to impose on security-interest enforcers only that one requirement, instead making them subject to the entire Act. See *Roberts*, 566 U.S. at 111 (rejecting interpretation that

would render superfluous a "carefully limited" statutory definition that applied only "[f]or the purpose of" a particular subsection (citation omitted)).[2]

2. Construing the FDCPA generally not to regulate security-interest enforcement as debt collection comports with the Act's purposes. Congress made clear that it did not intend categorically to bar lawful methods of enforcing consumers' debts. It found that "[m]eans other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts" and sought to "insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." 15 U.S.C. 1692(c) and (e). Congress was focused on "abusive, deceptive, and unfair debt collection practices" that "[e]xisting laws and procedures" were "inadequate" to address. 15 U.S.C. 1692(a) and (b).

Enforcement of security interests in accordance with applicable law does not implicate those concerns. Permitting security-interest holders to take or sell pledged collateral provides creditors an alternative remedy that does not depend on whether consumers agree or are able to make payments. It therefore poses significantly less risk than demanding payment from a consumer, where the creditor or its agent may resort to abusive tactics to persuade a consumer to pay.

Any risk of abuse is further reduced because enforcement of security interests is governed by an extensive,

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[2] The FDCPA's legislative history indicates that this structure was a considered compromise. Resp. Br. 25-27. An earlier bill treated those engaged in "enforcement of security interests" as debt collectors for all purposes, S. 918, 95th Cong., 1st Sess., § 803(f) (1977), while another excluded them entirely, S. 1130, 95th Cong., 1st Sess., § 802(8)(E) (1977). The enacted law struck a balance, including such persons only for purposes of Section 1692f(6).

well-established body of state law, which prescribes orderly procedures to enforce such interests and provides substantial safeguards to consumers. See pp. 4-6, *supra*; Resp. Br. 42-45. Creditors and their agents must "strictly adhere to" state-law requirements, or else the foreclosure will likely be void. 2 Dunaway § 17:2. There is no basis to assume that Congress deemed those state-law mechanisms inadequate or intended to federalize this traditional area of property law.

To the contrary, the FDCPA's text and structure reflect that Congress did not perceive the mere enforcement of security interests in accordance with applicable law as posing the same risk of consumer harms as the debt-collection activity to which the Act applies. Section 1692f(6) specifically addresses taking "property claimed as collateral through an enforceable security interest," 15 U.S.C. 1692f(6)(A), and it permits a debt collector to do so as long as the debt collector complies with applicable law and does not threaten to take collateral it does not actually intend to take. Section 1692f(6) forbids a debt collector to take "nonjudicial action" to "dispossess[]" or "disable[]" collateral *only if* (1) the debt collector is not legally entitled to do so, either because it lacks a "right to possession" under a security interest or the collateral is otherwise "exempt," 15 U.S.C. 1692f(6)(A) and (C); or (2) the debt collector has no "present intention" to take the property, 15 U.S.C. 1692f(6)(B). And Section 1692f(6) is the only FDCPA provision that applies to persons who are debt collectors under the additional definition because they enforce security interests. See 15 U.S.C. 1692a(6). Congress thus determined that laws governing security-interest enforcement (supplemented by a prohibition on false threats) provide adequate protection for consumers.

Even petitioner accepts that Congress did not intend to subject "typical * * * repossession agents (*i.e.*, the classic 'repo men')" to the Act's other provisions. Pet. Br. 5; see *id.* at 25-26. That particular, self-help method of security-interest enforcement often involves no direct state supervision. If repossession does not implicate the Act's core concerns, then *a fortiori* neither do more formalized state-law processes for enforcing security interests.[3]

3. *Heintz* v. *Jenkins*, 514 U.S. 291 (1995), on which petitioner relies (Br. 19), is not to the contrary. The "issue before [the Court]" in *Heintz* "[wa]s whether the term 'debt collector' in the [FDCPA] applies to a lawyer who 'regularly,' *through litigation*, tries to collect consumer debts." 514 U.S. at 292 (citation omitted). The Court held that it does. See *id.* at 294-299.

Heintz had no occasion to address whether enforcing a security interest constitutes debt collection, because the case involved a direct effort to obtain repayment. The creditor in *Heintz* sued a consumer to recover the balance due on a defaulted loan, and the creditor's lawyer wrote to the consumer's lawyer "[a]s part of an effort to settle the suit," listing the amount due. 514 U.S. at 293. The dispute was not whether that communication otherwise constituted debt collection, but whether it was nonetheless exempt from the FDCPA on the ground that the Act does not "apply to lawyers engaged in litigation." *Id.* at 294. The Court rejected that argument, reasoning that "a lawyer who regularly tries to obtain payment of consumer debts through legal proceedings is a lawyer who regularly 'attempts' to 'collect' those consumer debts," and Congress had enacted but since repealed an

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[3] As discussed below, see pp. 29-31, *infra*, petitioner's contention that the additional definition of "debt collector" is confined to repossession agents is incorrect on its own terms.

exception for lawyers collecting debts on clients' behalf. *Ibid.* (citation omitted). *Heintz* thus stands only for the proposition that a lawyer who engages in conduct that constitutes debt collection in the course of litigation is not exempt from the Act on that basis. It does not speak to whether enforcing a security interest is debt collection.

B. Initiating A Nonjudicial-Foreclosure Proceeding Constitutes Enforcement Of A Security Interest And So Generally Is Not Debt Collection Under The FDCPA

Because enforcement of a security interest by itself is not debt collection under the FDCPA (apart from Section 1692f(6)), a person cannot violate the Act by taking actions that are legally required to enforce a security interest. That is dispositive here because the initiation of a Colorado nonjudicial-foreclosure proceeding undisputedly was a required step in enforcing a security interest.[4]

1. The FDCPA does not define "security interests" or "enforcement," so the terms should be given their "ordinary meaning." *Encino Motorcars, LLC* v. *Navarro*, 138 S. Ct. 1134, 1140 (2018) (citation omitted); see *Heintz*, 514 U.S. at 294. "Security interest" is a legal

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[4] Although not implicated here, actions that are clearly incidental to the enforcement of a security interest also would not constitute debt collection (unless they involve an effort to obtain repayment of the debt) regardless of whether state law strictly requires them. For example, state law might not require a repossession agent to send a consumer a notice of the specific time the agent will repossess property, but the agent might do so as a courtesy to the consumer. There is no basis to conclude that Congress intended to regulate that type of purely informational communication as debt collection. This case does not present that question because, as explained below, state law undisputedly required McCarthy to file the notice with the public trustee to initiate a nonjudicial foreclosure.

term, and in ordinary legal usage, it generally refers to a property interest given to a creditor to secure a debt, granting the creditor the right to take or sell the property if the debtor does not pay. *Black's Law Dictionary* did not separately define "security interest" when the FDCPA was enacted, but it explained that the term "security" "is usually applied to an obligation, pledge, mortgage, deposit, lien, etc., given by a debtor in order to make sure the payment or performance of his debt, by furnishing the creditor with a resource to be used in case of failure in the principal obligation." *Black's Law Dictionary* 1522 (4th ed. 1951). Contemporaneous non-legal dictionaries mirrored that meaning of "security." See, *e.g.*, *Webster's New International Dictionary* 2263 (2d ed. 1958) (*Webster's Second*) ("*Law.* a. Something given, deposited, or pledged, to make secure, or certain, the fulfillment of an obligation, the payment of debt, etc.; property given or serving to render secure the enjoyment or enforcement of a right."). When "security interest" was added to *Black's Law Dictionary* two years after the Act's enactment, it was defined as (*inter alia*) "[a] form of interest in property which provides that the property may be sold on default in order to satisfy the obligation for which the security interest is given." *Black's Fifth* 1217. The term carries a substantially similar meaning today. See *Black's Tenth* 1562.[5]

"Enforce" means (*inter alia*) "[t]o put in force," to "cause to take effect," or "to give effect to." *Webster's Second* 847; see *Black's Fifth* 474; *Black's Tenth* 645. "[E]nforcement of security interests," 15 U.S.C. 1692a(6), therefore means giving force or effect to a creditor's

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[5] Other federal statutes adopt similar definitions, tailored to their particular contexts. See 7 U.S.C. 1631(e)(7); 11 U.S.C. 101(51), 1110(d)(2), 1168(d)(2); 26 U.S.C. 6323(h)(1); 49 U.S.C. 14301(a)(3).

right to take or compel the sale of pledged property in accordance with applicable law. When Congress referred to "enforcement of security interests," it presumably had in mind the methods of giving effect to such rights then available under state law. For example, in the case of personal property, if a consumer defaults on the debt, the holder of the security interest often may take possession of or disable the property in certain circumstances. U.C.C. § 9-609 (2017); see *id.* § 9-607(a) (describing other actions secured party may take following a default).

Enforcement of a security interest in real property has long taken the form of foreclosing on a mortgage—typically through a proceeding to compel the sale of mortgaged property. See, *e.g.*, William F. Walsh, *Treatise on Mortgages* § 67, at 278 (1934). Foreclosure is critically distinct from an action to recover on a consumer's *personal* liability to repay a debt—including to recover any amount that remains unpaid after the property has been sold. See Restatement § 8.2 & cmt. a. As respondent observes (Br. 4, 21), at common law, actions to foreclose on a mortgage were distinct from actions to recover a debt from the mortgagor personally. Today, a State may permit a creditor to do both in one proceeding—*i.e.*, to foreclose on a mortgage, and then to obtain a judgment against the consumer for any deficiency, or vice versa—but the two remedies remain distinct. See Restatement § 8.2. When foreclosure is divorced from any effort to recover a remaining deficiency from the consumer, it constitutes enforcement of a security interest and so generally is not debt collection under the FDCPA.

2. Commencing a Colorado nonjudicial-foreclosure proceeding, as McCarthy did here, is the enforcement of a security interest. Colorado's process allows a creditor

with a security interest in real property to request that the public trustee sell the property to enforce that interest. If the sale is approved, the trustee sells the property and distributes the proceeds—first to lienholders, then the remainder if any to the owner. Although Colorado's procedure involves a court, the creditor cannot obtain a deficiency judgment in the same proceeding, but must file a separate suit. See pp. 7-8, *supra*.

Because Colorado's nonjudicial-foreclosure process is a method for enforcing a security interest, action that is legally required to invoke or prosecute a nonjudicial-foreclosure proceeding is not debt collection under the FDCPA (except for 15 U.S.C. 1692f(6)). In this case, petitioner has not disputed that filing of the notice of election and demand with a public trustee is a required step in pursuing nonjudicial foreclosure. McCarthy therefore did not engage in debt collection triggering the FDCPA provisions at issue here.[6]

That conclusion also avoids potentially substantial but likely unintended interference by federal law with state-law processes that do not implicate the problems the

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[6] Consistent with this understanding, in a 1992 opinion letter, FTC staff stated their view that the FDCPA does not apply to "a notice sent by an attorney collector in connection with a non-judicial foreclosure" that was required "by statute as a condition precedent to the enforcement of a contractual obligation between a creditor and a debtor, whether by judicial or non-judicial process." Office of the Secretary, FTC, Staff Opinion Letter, 1992 WL 12622329, at *3 (Oct. 8, 1992). In *Vien-Phuong Thi Ho* v. *ReconTrust Co.*, 858 F.3d 568 (9th Cir.), cert. denied, 138 S. Ct. 504 (2017), the Bureau filed an amicus brief, at the court of appeals' invitation, arguing that notices required by state law to be sent to consumers to effectuate a nonjudicial foreclosure did constitute debt collection under the Act. See Gov't Br. at 6-20, *Ho*, *supra* (No. 10-56884). The Bureau has reconsidered that position and now endorses the position set forth in this brief.

FDCPA states Congress sought to address. For example, as the court of appeals observed, Pet. App. 10a-11a, the FDCPA prohibits a debt collector, in connection with a debt, from communicating with third parties, 15 U.S.C. 1692c(b), or directly with a consumer whom a debt collector knows is represented by an attorney, 15 U.S.C. 1692c(a)(2). But state law—in Colorado and elsewhere—often requires a party pursuing nonjudicial foreclosure to do both, by advertising the foreclosure sale and sending certain notices to the debtor. See Colo. R. Civ. P. 120(a) and (b); Pet. App. 10a-11a; see also *Vien-Phuong Thi Ho* v. *ReconTrust Co.*, 858 F.3d 568, 575 (9th Cir.) (describing California law), cert. denied, 138 S. Ct. 504 (2017).

It is highly unlikely that Congress intended to preclude creditors from supplying notices to the public and to consumers that States require. Indeed, in 15 U.S.C. 1692n, Congress disclaimed any intention to "annul, alter, or affect, or exempt any person subject to the provisions of [the Act] from complying with the laws of any State with respect to debt collection practices" unless they are "inconsistent with" the FDCPA. *Ibid.* Given that state law typically requires strict compliance with foreclosure procedures, see pp. 5-6, *supra*, construing the FDCPA to preclude compliance with those procedures could impede state foreclosures. It is especially improbable that Congress intended the FDCPA to outlaw notices to the consumer and the public required by state law, because such notices can benefit consumers in multiple ways—for example, keeping consumers apprised of the proceedings and their rights, and encouraging competitive bidding on property to be sold. See Resp. Br. 43-45.

3. Although taking steps legally required to effectuate a nonjudicial foreclosure does not constitute debt

collection for most FDCPA provisions, entities that pursue such foreclosures remain subject to important constraints. First, such entities must comply with applicable state law; otherwise, the foreclosure sale will likely be invalid. See 2 Dunaway § 17:2. Second, entities that meet the additional definition of "debt collector" because their principal purpose is enforcing security interests are subject to the requirements of 15 U.S.C. 1692f(6). Such entities therefore may take or threaten nonjudicial action to dispossess or disable property only if they have an enforceable security interest, have the present intention to do so, and doing so is not otherwise barred by law. *Ibid.*[7]

Third, a person who engages in security-interest enforcement but who goes further and undertakes other

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[7] In a footnote, the court of appeals stated that those who engage in nonjudicial foreclosures are not subject to Section 1692f(6). Pet. App. 7a-8a n.4. The court observed that "[Section] 1692f(6) prohibits 'dispossession or disablement of property' when the security enforcer has no 'present right to possession of the property,' or when the enforcer has no 'present intention to take possession of the property.'" *Id.* at 8a n.4. It stated that "[a] non-judicial foreclosure proceeding does not fit this bill" because the security-interest enforcer "has no present right to possession of the property," and instead "[i]t is the *public trustee* who holds the deed of trust and sells the property." *Ibid.* That statement was not necessary to the court's judgment, but it is incorrect. A person does not violate Section 1692f(6) by taking steps to carry out a nonjudicial foreclosure in accordance with state law simply because a trustee, rather than the person commencing foreclosure, formally holds the present right to possession. In any event, the court appears to have conflated whether a person carrying out a nonjudicial foreclosure is subject to Section 1692f(6) with whether the person's conduct violates that provision. Under the Act's plain terms, all debt collectors—including enforcers of security interests, who are covered only under Section 1692a(6)'s additional definition—are subject to, and must comply with, Section 1692f(6).

acts that themselves constitute debt collection may be subject to the FDCPA like anyone else. For example, a firm hired to pursue nonjudicial foreclosure that sends the required pre-sale notices to a consumer—but *also* sends letters demanding payment or using the threat of foreclosure to pressure the consumer to pay—engages in debt collection, even though the foreclosure itself is not debt collection. Similarly, if an entity that seeks foreclosure also pursues a deficiency judgment, the latter conduct would be debt collection. See, *e.g.*, *McNair* v. *Maxwell & Morgan PC*, 893 F.3d 680, 683 (9th Cir. 2018); *Cohen* v. *Rosicki, Rosicki & Assocs., P.C.*, 897 F.3d 75, 81 n.7 (2d Cir. 2018). The FDCPA does not immunize persons who enforce security interests from its requirements when they regularly engage in additional conduct that constitutes debt collection under the Act.

Petitioner contends that "it is difficult to draw an administrable line" between enforcement of security interests and "'more aggressive collection efforts.'" Pet. Br. 18 (quoting Pet. App. 12a). But drawing that line has not proven too hard for federal courts in practice.[8] Most States define precisely when the nonjudicial-foreclosure process begins—typically, when a notice of default or

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[8] See, *e.g.*, *Ho*, 858 F.3d at 574 (communications that were "limited to the foreclosure process," "didn't request payment," and "merely informed" consumer about foreclosure process were not debt collection); *Reese* v. *Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211, 1218 (11th Cir. 2012) (defendant was engaged in debt collection because, rather than strictly adhering to state notice requirements, it made a demand for payment that was not required to effectuate nonjudicial foreclosure); *Piper* v. *Portnoff Law Assocs., Ltd.*, 396 F.3d 227, 233-234 (3d Cir. 2005) (letters that "demanded the personal payment of money" were debt collection even though debt collector purportedly sought to "enforce a lien").

similar document is served or recorded. 2 Dunaway § 17:1. If communications occur before the process may commence, they likely are not enforcement of a security interest.

C. Petitioner's Contrary Arguments Lack Merit

1. a. Petitioner principally contends (Br. 14-20, 24-26) that, regardless of whether nonjudicial foreclosure constitutes enforcement of a security interest, it is *also* debt collection and thus falls under the FDCPA. In his view (Br. 25), the Act applies to persons who collect debts by means of enforcing a security interest, and nonjudicial foreclosure constitutes both a "'direct[] [and] indirect[]' method of collecting a debt." *Id.* at 14 (quoting 15 U.S.C. 1692a(6)). That is incorrect.

Petitioner first argues (Br. 14-15) that "[n]on-judicial foreclosure is a 'direct' attempt to collect a debt" because state law generally requires a party seeking foreclosure to send notices to the consumer that send a "message" equivalent to a demand for repayment. That is mistaken. The FDCPA's text makes the person's actual conduct, not an implicit "message" a consumer might perceive from it, the touchstone in identifying who is a debt collector. See 15 U.S.C. 1692a(6). In any event, although those required notices advise debtors of their right to avoid foreclosure by paying the debt, advising consumers of that state-law right is not tantamount to a demand for repayment. Such a notice apprises the consumer that the creditor intends to pursue foreclosure *instead of* seeking repayment from the consumer directly of part or all of the debt and that the consumer has the option of repaying.

Moreover, other methods of enforcing security interests exist that similarly require sending notices to con-

sumers and that even petitioner does not contend constitute debt collection. For example, petitioner holds out "classic 'repo' activity," such as repossession of a vehicle, as the paradigmatic means of enforcing security interests that is not debt collection. Pet. Br. 25. But in the case of vehicle repossession, the model U.C.C. requires that notice be provided to consumers after the collateral is taken but before it is disposed of, which informs the consumer of his rights to redeem the collateral by paying the balance owed. U.C.C. § 9-614 (2017); see *id.* § 9-623 (redemption rights). Petitioner's theory cannot explain why those notices are not debt collection but notices initiating nonjudicial foreclosure are.

Petitioner's argument also proves far too much. If he were correct that nonjudicial foreclosure constitutes debt collection because it has the intent or effect of persuading the consumer to repay the debt, the same would appear to be true of any other form of enforcing security interests. For example, petitioner acknowledges (Br. 25-26) that "changing locks" is the enforcement of a security interest and is not "debt collection" under the Act. But physically disabling a consumer's property (*e.g.*, a vehicle) is at least equally likely to have the intent and effect of inducing the consumer to pay, and it provides a much more powerful inducement to pay than a "classic dunning letter[]." Pet. Br. 16; see generally Michael Corkery & Jessica Silver-Greenberg, *Miss a Payment? Good Luck Moving That Car*, N.Y. Times, Sept. 24, 2014 (addressing modern electronic-disabling technology). Even if formal notices are not required, a tow truck removing a consumer's vehicle from his driveway sends at least as strong a "message" to an "ordinary consumer" (Pet. Br. 15) as a notice initiating a nonjudicial-foreclosure proceeding.

Petitioner also contends that "non-judicial foreclosure is an 'indirect' attempt to collect a debt" because a "foreclosure sells the house to pay the debt" and thereby "liquidat[es] the borrower's debt." Pet. Br. 19-20 (emphasis omitted).[9] That argument likewise proves too much. Every enforcement of a security interest—whether by repossession or by power of sale—necessarily entails "payment or liquidation" of a debt in the same sense as foreclosure. The purpose of a security interest is to secure the consumer's obligation to repay by giving the creditor recourse against particular property if the consumer defaults. See pp. 4-6, 19-21, *supra*. And the intended result of repossessing property is that either the security-interest holder will recoup some or all the value of the defaulted debt (*e.g.*, by selling the repossessed property) or the consumer will pay the debt. Either way, repossession (if successful) results in satisfying part or all of the outstanding debt. The fact that the repossession agent itself may not sell the property is equally immaterial. Once a consumer's property has been taken from him, whether the creditor keeps or sells the property—and if it is sold, who conducts the sale—has no bearing on whether the debt has been liquidated.

Petitioner's direct and indirect debt-collection arguments thus would appear to apply to all security-interest enforcement. The FDCPA should not be construed to render Section 1692a(6)'s additional definition of "debt collector" "superfluous in all but the most unusual circumstances." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 29

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[9] The general definition of "debt collector" refers to "indirect[]" efforts to collect debts only with respect to persons who "regularly collect[]" debts, not with respect to persons engaged in a business the "principal purpose" of which is to collect debts. 15 U.S.C. 1692a(6).

(2001); see *id.* at 31 (rejecting interpretation under which an "express exception would be rendered 'insignificant, if not wholly superfluous'" (citation omitted)).

b. Petitioner argues (Br. 25) that his position would not render Section 1692a(6)'s additional definition of "debt collector" superfluous if that definition is construed to cover only "classic 'repo' activity." That arbitrarily narrow reading of the additional definition lacks any basis in text or logic, and does not even save the additional definition from superfluity under petitioner's theory.

Petitioner's argument requires reading "the enforcement of security interests" in Section 1692a(6) as a cryptic euphemism for one specific form of self-help. But "enforcement" and "security interests" are general terms whose ordinary meanings sweep far beyond repossession of the type petitioner describes. See pp. 19-21, *supra*. "Without some indication to the contrary, general words * * * are to be accorded their full and fair scope" and thus "must be given general effect," and not "arbitrarily limited." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 101 (2012); see *id.* at 101-106; see, *e.g.*, *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79-80 (1998). In addition, Congress referred specifically to "dispossession" and "disablement" elsewhere in the same statute, 15 U.S.C. 1692f(6), and petitioner reads those words (Br. 25-26) to apply only to "classic 'repo' activity." The "presum[ption] that Congress acts intentionally and purposely" in "includ[ing] particular language in one section of [the] statute but omit[ting] it in another section of the same Act," *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (citation omitted), counsels strongly against reading the different, broader phrase "enforcement of security interests" in Section 1692a(6)

narrowly to encompass *only* "classic 'repo' activity." Pet. Br. 25.

Moreover, construing Section 1692a(6)'s definition to encompass only "classic 'repo' activity," Pet. Br. 25, and thus to exempt only that activity from nearly all of the FDCPA's provisions, would turn the Act upside-down. A repossession agency that physically removes pledged collateral from a consumer's residence is if anything more naturally described as "collect[ing]" from the consumer than a creditor's agent hired to file foreclosure papers. 15 U.S.C. 1692a(6). And the abusive practices and other problems that concerned Congress, see 15 U.S.C. 1692(a), seem more likely to arise if a repossession agency interacts with consumers in person. It would be incongruous to impose fewer or no restrictions on repossession that may involve face-to-face confrontations with consumers than on filing papers with a state official to commence a proceeding to sell collateral in an orderly manner—which may involve no personal interaction with the consumer at all.

Petitioner's interpretation would also likely leave a significant and unexplained gap in the Act's coverage. Properly construed, the FDCPA applies to persons who demand repayment of a debt in kind (rather than in cash), or who take a consumer's unsecured property to satisfy such a debt, because neither of those constitutes enforcing a security interest. But on petitioner's reading, such persons would appear to be exempt: in petitioner's view, repossessing property is not debt collection—so long as the repossession agent does not communicate with the consumer and does not itself sell the property—and repossessing unsecured property is not enforcement of a security interest. It is implausible that Congress left a loophole in the statute for debt collectors who do not

deal in cash and intended to leave consumers unprotected from efforts to reclaim unsecured property, yet intended to subject foreclosure pursuant to state law to all of the FDCPA's requirements.

In any event, petitioner's atextual reading of "enforcement of security interests" to mean only "classic 'repo' activity" (Br. 25) does not even save the additional definition of "debt collector" from becoming surplusage on his theory. Petitioner's arguments that nonjudicial foreclosure constitutes a direct and indirect method of debt collection apply with full force to repossession. See pp. 27-29, *supra*. Repossession has the intent and effect of inducing repayment to at least the same extent as nonjudicial foreclosure, and its intended result is that either the debtor will repay the debt or the collateral will be sold to satisfy part or all of the debt. If the collateral is sold, the FDCPA's application cannot sensibly turn on whether the repossession agent itself sells the collateral or turns it over to the creditor to sell. Petitioner's ad hoc interpretation of the additional, limited-purpose definition of debt collector leaves it a dead letter.

2. Petitioner also incorrectly contends (Br. 21) that the venue requirement in 15 U.S.C. 1692i(a)(1) supports his view that "foreclosure constitutes 'debt collection.'" Section 1692i(a)(1) provides that "[a]ny debt collector who brings any legal action on a debt against any consumer shall[,] * * * in the case of an action to enforce an interest in real property securing the consumer's obligation, bring such action only in a judicial district or similar legal entity in which such real property is located." *Ibid.* That text does not classify an "action to enforce an interest in real property securing the consumer's obligation" as "debt collection." It simply

requires persons who are otherwise "debt collectors" to bring actions to enforce security interests in real property in specified venues. See *Kaltenbach* v. *Richard*, 464 F.3d 524, 529 (5th Cir. 2006).

That reading does not leave Section 1692i with "no realistic application." Pet. Br. 21. Many entities that satisfy the general definition of "debt collector" engage in the type of legal actions that Section 1692i governs. In particular, the provision often would apply to entities whose principal purpose is carrying out *judicial* foreclosures—which in some States is the exclusive means of foreclosing on residential mortgages. Moreover, Section 1692i does not speak to nonjudicial foreclosures at all, which do not involve bringing a "legal action on a debt against [a] consumer." Pet. App. 9a (citation omitted); see 2 Dunaway § 16:1; *Ho*, 858 F.3d at 570-571.

3. Finally, petitioner contends (Br. 21) that Congress "excluded certain groups, *but not entities pursuing foreclosures*, from the FDCPA's scope," and infers that nonjudicial foreclosure therefore must be covered. But the absence of such an exclusion reflects that persons who engage in nonjudicial foreclosure (and other enforcement of security interests) *are* debt collectors for purposes of one FDCPA provision, Section 1692f(6). Petitioner's assertion (Br. 23-24) that the Act's history shows Congress did not intend to exempt mortgages fails for the same reason: mortgage debt is not categorically exempt from the Act, and debt collection in connection with a mortgage may trigger the FDCPA. Congress simply made clear that it did not consider the enforcement of security interests by itself to be debt collection.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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NOVEMBER 2018

APPENDIX

1. 15 U.S.C. 1692 provides:

Congressional findings and declaration of purpose

(a) Abusive practices

There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.

(b) Inadequacy of laws

Existing laws and procedures for redressing these injuries are inadequate to protect consumers.

(c) Available non-abusive collection methods

Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts.

(d) Interstate commerce

Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.

(e) Purposes

It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively

disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

2. 15 U.S.C. 1692a provides:

Definitions

As used in this subchapter—

(1) The term "Bureau" means the Bureau of Consumer Financial Protection.

(2) The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium.

(3) The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.

(4) The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.

(5) The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

(6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of

which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include—

(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

(B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;

(C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;

(D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

(E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and

(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

(7) The term "location information" means a consumer's place of abode and his telephone number at such place, or his place of employment.

(8) The term "State" means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing.

3. 15 U.S.C. 1692b provides:

Acquisition of location information

Any debt collector communicating with any person other than the consumer for the purpose of acquiring location information about the consumer shall—

(1) identify himself, state that he is confirming or correcting location information concerning the consumer, and, only if expressly requested, identify his employer;

(2) not state that such consumer owes any debt;

(3) not communicate with any such person more than once unless requested to do so by such person or unless the debt collector reasonably believes that the earlier response of such person is erroneous or incomplete and that such person now has correct or complete location information;

(4) not communicate by post card;

(5) not use any language or symbol on any envelope or in the contents of any communication effected by the mails or telegram that indicates that the debt collector is in the debt collection business or that the communication relates to the collection of a debt; and

(6) after the debt collector knows the consumer is represented by an attorney with regard to the subject debt and has knowledge of, or can readily ascertain, such attorney's name and address, not communicate with any person other than that attorney, unless the attorney fails to respond within a reasonable period of time to communication from the debt collector.

4. 15 U.S.C. 1692c provides:

Communication in connection with debt collection

(a) Communication with the consumer generally

Without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt—

(1) at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer. In the absence of knowledge of circumstances to the contrary, a debt collector shall assume that the convenient time for communicating with a consumer is after 8 o'clock antemeridian and before 9 o'clock postmeridian, local time at the consumer's location;

(2) if the debt collector knows the consumer is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the attorney fails to respond within a reasonable period of time to a communication from the debt collector or unless the attorney consents to direct communication with the consumer; or

(3) at the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.

(b) Communication with third parties

Except as provided in section 1692b of this title, without the prior consent of the consumer given directly

to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

(c) Ceasing communication

If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt, except—

(1) to advise the consumer that the debt collector's further efforts are being terminated;

(2) to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or

(3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.

If such notice from the consumer is made by mail, notification shall be complete upon receipt.

(d) "Consumer" defined

For the purpose of this section, the term "consumer" includes the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator.

5. 15 U.S.C. 1692d provides:

Harassment or abuse

A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The use or threat of use of violence or other criminal means to harm the physical person, reputation, or property of any person.

(2) The use of obscene or profane language or language the natural consequence of which is to abuse the hearer or reader.

(3) The publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency or to persons meeting the requirements of section 1681a(f) or 1681b(3)[1] of this title.

(4) The advertisement for sale of any debt to coerce payment of the debt.

(5) Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.

(6) Except as provided in section 1692b of this title, the placement of telephone calls without meaningful disclosure of the caller's identity.

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[1] See References in Text note below

6. 15 U.S.C. 1692e provides:

False or misleading representations

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.

(2) The false representation of—

(A) the character, amount, or legal status of any debt; or

(B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.

(3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.

(4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

(6) The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to—

(A) lose any claim or defense to payment of the debt; or

(B) become subject to any practice prohibited by this subchapter.

(7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.

(8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.

(9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

(11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communi-

cations that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.

(12) The false representation or implication that accounts have been turned over to innocent purchasers for value.

(13) The false representation or implication that documents are legal process.

(14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

(15) The false representation or implication that documents are not legal process forms or do not require action by the consumer.

(16) The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 1681a(f) of this title.

7. 15 U.S.C. 1692f provides:

Unfair practices

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly

authorized by the agreement creating the debt or permitted by law.

(2) The acceptance by a debt collector from any person of a check or other payment instrument postdated by more than five days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than ten nor less than three business days prior to such deposit.

(3) The solicitation by a debt collector of any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution.

(4) Depositing or threatening to deposit any postdated check or other postdated payment instrument prior to the date on such check or instrument.

(5) Causing charges to be made to any person for communications by concealment of the true purpose of the communication. Such charges include, but are not limited to, collect telephone calls and telegram fees.

(6) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if—

(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;

(B) there is no present intention to take possession of the property; or

(C) the property is exempt by law from such dispossession or disablement.

(7) Communicating with a consumer regarding a debt by post card.

(8) Using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business.

8. 15 U.S.C. 1692g provides:

Validation of debts

(a) Notice of debt; contents

Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing—

(1) the amount of the debt;

(2) the name of the creditor to whom the debt is owed;

(3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;

(4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy

of such verification or judgment will be mailed to the consumer by the debt collector; and

(5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

(b) Disputed debts

If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) of this section that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector. Collection activities and communications that do not otherwise violate this subchapter may continue during the 30-day period referred to in subsection (a) unless the consumer has notified the debt collector in writing that the debt, or any portion of the debt, is disputed or that the consumer requests the name and address of the original creditor. Any collection activities and communication during the 30-day period may not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt or request the name and address of the original creditor.

(c) Admission of liability

The failure of a consumer to dispute the validity of a debt under this section may not be construed by any court as an admission of liability by the consumer.

(d) Legal pleadings

A communication in the form of a formal pleading in a civil action shall not be treated as an initial communication for purposes of subsection (a).

(e) Notice provisions

The sending or delivery of any form or notice which does not relate to the collection of a debt and is expressly required by title 26, title V of Gramm-Leach-Bliley Act [15 U.S.C. 6801 et seq.], or any provision of Federal or State law relating to notice of data security breach or privacy, or any regulation prescribed under any such provision of law, shall not be treated as an initial communication in connection with debt collection for purposes of this section.

9. 15 U.S.C. 1692h provides:

Multiple debts

If any consumer owes multiple debts and makes any single payment to any debt collector with respect to such debts, such debt collector may not apply such payment to any debt which is disputed by the consumer and, where applicable, shall apply such payment in accordance with the consumer's directions.

10. 15 U.S.C. 1692i provides:

Legal actions by debt collectors

(a) Venue

Any debt collector who brings any legal action on a debt against any consumer shall—

(1) in the case of an action to enforce an interest in real property securing the consumer's obligation, bring such action only in a judicial district or similar legal entity in which such real property is located; or

(2) in the case of an action not described in paragraph (1), bring such action only in the judicial district or similar legal entity—

(A) in which such consumer signed the contract sued upon; or

(B) in which such consumer resides at the commencement of the action.

(b) Authorization of actions

Nothing in this subchapter shall be construed to authorize the bringing of legal actions by debt collectors.

11. 15 U.S.C. 1692j provides:

Furnishing certain deceptive forms

(a) It is unlawful to design, compile, and furnish any form knowing that such form would be used to create the false belief in a consumer that a person other than the creditor of such consumer is participating in the collection of or in an attempt to collect a debt

such consumer allegedly owes such creditor, when in fact such person is not so participating.

(b) Any person who violates this section shall be liable to the same extent and in the same manner as a debt collector is liable under section 1692k of this title for failure to comply with a provision of this subchapter.

12. 15 U.S.C. 1692k provides:

Civil liability

(a) Amount of damages

Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of—

(1) any actual damage sustained by such person as a result of such failure;

(2)(A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000; or

(B) in the case of a class action, (i) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector; and

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an

action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

(b) Factors considered by court

In determining the amount of liability in any action under subsection (a) of this section, the court shall consider, among other relevant factors—

(1) in any individual action under subsection (a)(2)(A) of this section, the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional; or

(2) in any class action under subsection (a)(2)(B) of this section, the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, the resources of the debt collector, the number of persons adversely affected, and the extent to which the debt collector's noncompliance was intentional.

(c) Intent

A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

(d) Jurisdiction

An action to enforce any liability created by this subchapter may be brought in any appropriate United States district court without regard to the amount in

controversy, or in any other court of competent jurisdiction, within one year from the date on which the violation occurs.

(c) Advisory opinions of Bureau

No provision of this section imposing any liability shall apply to any act done or omitted in good faith in conformity with any advisory opinion of the Bureau, notwithstanding that after such act or omission has occurred, such opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

13. 15 U.S.C. 1692*l* provides:

Administrative enforcement

(a) Federal Trade Commission

The Federal Trade Commission shall be authorized to enforce compliance with this subchapter, except to the extent that enforcement of the requirements imposed under this subchapter is specifically committed to another Government agency under any of paragraphs (1) through (5) of subsection (b), subject to subtitle B of the Consumer Financial Protection Act of 2010 [12 U.S.C. 5511 et seq.]. For purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act (15 U.S.C. 41 et seq.), a violation of this subchapter shall be deemed an unfair or deceptive act or practice in violation of that Act. All of the functions and powers of the Federal Trade Commission under the Federal Trade Commission Act are available to the Federal Trade Commission to enforce compliance by any person with

this subchapter, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests under the Federal Trade Commission Act, including the power to enforce the provisions of this subchapter, in the same manner as if the violation had been a violation of a Federal Trade Commission trade regulation rule.

(b) Applicable provisions of law

Subject to subtitle B of the Consumer Financial Protection Act of 2010, compliance with any requirements imposed under this subchapter shall be enforced under—

(1) section 8 of the Federal Deposit Insurance Act [12 U.S.C. 1818], by the appropriate Federal banking agency, as defined in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)), with respect to—

(A) national banks, Federal savings associations, and Federal branches and Federal agencies of foreign banks;

(B) member banks of the Federal Reserve System (other than national banks), branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act [12 U.S.C. 601 et seq., 611 et seq.]; and

(C) banks and State savings associations insured by the Federal Deposit Insurance Corporation (other than members of the Federal

Reserve System), and insured State branches of foreign banks;

(2) the Federal Credit Union Act [12 U.S.C. 1751 et seq.], by the Administrator of the National Credit Union Administration with respect to any Federal credit union;

(3) subtitle IV of title 49, by the Secretary of Transportation, with respect to all carriers subject to the jurisdiction of the Surface Transportation Board;

(4) part A of subtitle VII of title 49, by the Secretary of Transportation with respect to any air carrier or any foreign air carrier subject to that part;

(5) the Packers and Stockyards Act, 1921 [7 U.S.C. 181 et seq.] (except as provided in section 406 of that Act [7 U.S.C. 226, 227]), by the Secretary of Agriculture with respect to any activities subject to that Act; and

(6) subtitle E of the Consumer Financial Protection Act of 2010 [12 U.S.C. 5561 et seq.], by the Bureau, with respect to any person subject to this subchapter.

The terms used in paragraph (1) that are not defined in this subchapter or otherwise defined in section 3(s) of the Federal Deposit Insurance Act (12 U.S.C. 1813(s)) shall have the meaning given to them in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101).

(c) Agency powers

For the purpose of the exercise by any agency referred to in subsection (b) of this section of its powers under any Act referred to in that subsection, a

violation of any requirement imposed under this subchapter shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in subsection (b) of this section, each of the agencies referred to in that subsection may exercise, for the purpose of enforcing compliance with any requirement imposed under this subchapter any other authority conferred on it by law, except as provided in subsection (d) of this section.

(d) Rules and regulations

Except as provided in section 1029(a) of the Consumer Financial Protection Act of 2010 [12 U.S.C. 5519(a)], the Bureau may prescribe rules with respect to the collection of debts by debt collectors, as defined in this subchapter.

14. 15 U.S.C. 1692m provides:

Reports to Congress by the Bureau; views of other Federal agencies

(a) Not later than one year after the effective date of this subchapter and at one-year intervals thereafter, the Bureau shall make reports to the Congress concerning the administration of its functions under this subchapter, including such recommendations as the Bureau deems necessary or appropriate. In addition, each report of the Bureau shall include its assessment of the extent to which compliance with this subchapter is being achieved and a summary of the enforcement actions taken by the Bureau under section 1692*l* of this title.

(b) In the exercise of its functions under this subchapter, the Bureau may obtain upon request the views of any other Federal agency which exercises enforcement functions under section 1692l of this title.

15. 15 U.S.C. 1692n provides:

Relation to State laws

This subchapter does not annul, alter, or affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency. For purposes of this section, a State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection provided by this subchapter.

16. 15 U.S.C. 1692*o* provides:

Exemption for State regulation

The Bureau shall by regulation exempt from the requirements of this subchapter any class of debt collection practices within any State if the Bureau determines that under the law of that State that class of debt collection practices is subject to requirements substantially similar to those imposed by this subchapter, and that there is adequate provision for enforcement.

17. 15 U.S.C. 1692p provides:

Exception for certain bad check enforcement programs operated by private entities

(a) In general

(1) Treatment of certain private entities

Subject to paragraph (2), a private entity shall be excluded from the definition of a debt collector, pursuant to the exception provided in section 1692a(6) of this title, with respect to the operation by the entity of a program described in paragraph (2)(A) under a contract described in paragraph (2)(B).

(2) Conditions of applicability

Paragraph (1) shall apply if—

(A) a State or district attorney establishes, within the jurisdiction of such State or district attorney and with respect to alleged bad check violations that do not involve a check described in subsection (b), a pretrial diversion program for alleged bad check offenders who agree to participate voluntarily in such program to avoid criminal prosecution;

(B) a private entity, that is subject to an administrative support services contract with a State or district attorney and operates under the direction, supervision, and control of such State or district attorney, operates the pretrial diversion program described in subparagraph (A); and

(C) in the course of performing duties delegated to it by a State or district attorney under the contract, the private entity referred to in subparagraph (B)—

(i) complies with the penal laws of the State;

(ii) conforms with the terms of the contract and directives of the State or district attorney;

(iii) does not exercise independent prosecutorial discretion;

(iv) contacts any alleged offender referred to in subparagraph (A) for purposes of participating in a program referred to in such paragraph—

(I) only as a result of any determination by the State or district attorney that probable cause of a bad check violation under State penal law exists, and that contact with the alleged offender for purposes of participation in the program is appropriate; and

(II) the alleged offender has failed to pay the bad check after demand for payment, pursuant to State law, is made for payment of the check amount;

(v) includes as part of an initial written communication with an alleged offender a clear and conspicuous statement that—

(I) the alleged offender may dispute the validity of any alleged bad check violation;

(II) where the alleged offender knows, or has reasonable cause to believe, that the alleged bad check violation is the result of theft or forgery of the check, identity theft, or other fraud that is not the result of the conduct of the alleged offender, the alleged offender may file a crime report with the appropriate law enforcement agency; and

(III) if the alleged offender notifies the private entity or the district attorney in writing, not later than 30 days after being contacted for the first time pursuant to clause (iv), that there is a dispute pursuant to this subsection, before further restitution efforts are pursued, the district attorney or an employee of the district attorney authorized to make such a determination makes a determination that there is probable cause to believe that a crime has been committed; and

(vi) charges only fees in connection with services under the contract that have been authorized by the contract with the State or district attorney.

(b) Certain checks excluded

A check is described in this subsection if the check involves, or is subsequently found to involve—

(1) a postdated check presented in connection with a payday loan, or other similar transaction, where the payee of the check knew that the issuer had insufficient funds at the time the check was made, drawn, or delivered;

(2) a stop payment order where the issuer acted in good faith and with reasonable cause in stopping payment on the check;

(3) a check dishonored because of an adjustment to the issuer's account by the financial institution holding such account without providing notice to the person at the time the check was made, drawn, or delivered;

(4) a check for partial payment of a debt where the payee had previously accepted partial payment for such debt;

(5) a check issued by a person who was not competent, or was not of legal age, to enter into a legal contractual obligation at the time the check was made, drawn, or delivered; or

(6) a check issued to pay an obligation arising from a transaction that was illegal in the jurisdiction of the State or district attorney at the time the check was made, drawn, or delivered.

(c) Definitions

For purposes of this section, the following definitions shall apply:

(1) State or district attorney

The term "State or district attorney" means the chief elected or appointed prosecuting attorney in a district, county (as defined in section 2 of title 1), municipality, or comparable jurisdiction, including State attorneys general who act as chief elected or appointed prosecuting attorneys in a district, county (as so defined), municipality or comparable jurisdiction, who may be referred to by a variety of titles such as district attorneys, prosecuting attorneys, commonwealth's attorneys, solicitors, county attorneys, and state's attorneys, and who are responsible for the prosecution of State crimes and violations of jurisdiction-specific local ordinances.

(2) Check

The term "check" has the same meaning as in section 5002(6) of title 12.

(3) Bad check violation

The term "bad check violation" means a violation of the applicable State criminal law relating to the writing of dishonored checks.

No. 17-1307

In The Supreme Court of the United States

DENNIS OBDUSKEY,

Petitioner,

v.

MCCARTHY & HOLTHUS LLP,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF *AMICUS CURIAE* COLORADO MORTGAGE LENDERS ASSOCIATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a law firm that initiates a non-judicial foreclosure to enforce a security interest under Colorado law thereby engages in debt collection for purposes of the Fair Debt Collection Practices Act.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37, Colorado M.B.A. d/b/a Colorado Mortgage Lenders Association (CMLA) respectfully submits this brief *amicus curiae* in support of Respondent McCarthy & Holthus LLP.[1]

CMLA is a non-profit, tax-exempt corporation organized under the laws of the State of Colorado for the purpose of supporting mortgage lenders in Colorado. CMLA has not participated in other cases before this Court.

CMLA considers this case to be of special significance in that it concerns the application of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 (FDCPA) to the distinctive form of non-judicial foreclosure activity governed by Colorado State law. CMLA members, through their counsel in Colorado, utilize the Colorado non-judicial foreclosure procedure to recover collateral that has been pledged as security for mortgage loans when there is a default under the terms of Colorado mortgage loan documents. As an organization whose members rely on the Colorado non-judicial foreclosure process and whose members have

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *Amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus* or its counsel made a monetary contribution to its preparation or submission.

been involved with the frequent and extensive revisions to the Colorado foreclosure statutes, CMLA has first-hand knowledge of the Colorado procedure and its many benefits. CMLA seeks to clarify the frequent misunderstandings and resulting inaccurate descriptions of the Colorado non-judicial foreclosure process in Petitioner's brief and the *amici* briefs filed in support of Petitioner and to highlight the provisions of the Colorado non-judicial procedures that support the Respondent's position.

SUMMARY OF ARGUMENT

FDCPA bars debt collectors from engaging in certain practices while attempting to collect debts. In defining "debt collector," the FDCPA distinguishes between entities that primarily engage in "the collection of any debts," and entities that primarily engage in the "enforcement of security interests." 15 U.S.C. § 1692a(6). Entities that engage in the collection of any debts are "debt collectors" subject to the FDCPA for all purposes. Entities that primarily engage in the enforcement of security interests are only subject to FDCPA when specific conduct outlined at 15 U.S.C. § 1692f(6) is at issue. However, the conduct identified in 15 U.S.C. § 1692f(6) is not at issue here. The question presented in this case is whether a law firm enforcing a security interest by initiating a non-judicial foreclosure absent any factors listed in section 1692f(6) with limited judicial involvement and without a monetary judgment constitutes debt collection

under the FDCPA requiring the law firm to comply with FDCPA.

The answer to the question presented in this case is "no." A non-judicial foreclosure, by its very nature, does not constitute debt collection under the FDCPA as it is enforcing a security interest and recovering collateral as opposed to debt collection. *Diessner v. Mortgage Electronic Registration Systems*, 618 F.Supp.2d 1184, 1198 (D. Ariz. 2009), affirmed, 384 Fed. Appx. 609, 2010 WL 2464899. A consumer has no obligation to pay any money in a non-judicial foreclosure. Colorado's unique public trustee foreclosure system has a long history of providing a fair and efficient system for facilitating foreclosures in Colorado. Under the Colorado statutory scheme, the lawyers representing the holders of evidences of debt do not demand payment from borrowers and do not obtain a monetary judgment through the process. When lawyers representing the holders of evidences of debt in Colorado are handling non-judicial foreclosures in accordance with Colorado law, they are representing their clients in the enforcement of security interests and therefore, they are not debt collectors under the FDCPA.

Foreclosure is clearly a matter of state law, evidenced by the 51 separate foreclosure laws in place in the various states and District of Columbia. Had Congress wanted a national foreclosure scheme, it would have constructed one; instead it has affirmatively avoided conflicts with the state law structures regarding foreclosures. The public trustee non-judicial foreclosure system is peculiar to Colorado. Requiring

law firms in Colorado handling non-judicial foreclosures to abide by FDCPA where it is not mandated by Congress would make it impossible for the lawyers to comply with certain notices required under Colorado law that are designed for the benefit and protection of the consumer. Additionally, it would serve as a federal mandate that all foreclosures throughout the country must be handled judicially, despite the clear preference of Colorado for its public trustee foreclosure system and other states' preference for their non-judicial foreclosure procedures. Absent any clear and manifest intent from Congress to implement such a national foreclosure system one cannot be directed through a misconstrued interpretation of the FDCPA as Petitioner argues. Further, public policy favors non-judicial foreclosure as it results in faster recovery after an economic crisis and an increase in home values.

The court below was correct in holding that Respondent was not acting as a debt collector within the definition of FDCPA when it commenced a non-judicial public trustee foreclosure pursuant to Colorado law. Respondent utilized the public trustee foreclosure process pursuant to Colorado law, never demanded payment from the Petitioner and did not pursue a monetary judgment against the Petitioner. Respondent sought only to enforce a security interest and thereby recover the collateral the Petitioner pledged as security to the lender when he borrowed the funds and consented to the public trustee foreclosure process. Thus, according to its clear language, FDCPA does not apply.

For these reasons, this Court should affirm the Tenth Circuit's decision.

I. HISTORY OF THE COLORADO PUBLIC TRUSTEE FORECLOSURE SYSTEM

Colorado, like most states, follows the lien theory under which mortgages, trust deeds, or other instruments intended to secure the payment of an obligation affecting title to or an interest in real property are deemed a lien and are not deemed a conveyance. Therefore, the owner of the obligation secured by the lien cannot recover possession of real property without foreclosure and sale. Colo. Rev. Stat. § 38-35-117. Prior to the creation of the public trustee system, Colorado, in step with all other trustee or non-judicial states, utilized a private trustee system for foreclosures wherein the trustees functioned at the lenders' direction. At the 1894 Colorado General Assembly, a bill was proposed to eliminate the deed of trust foreclosure system and move to a judicial foreclosure system. This bill was specifically rejected by the Colorado legislature. However, in that same year, the Colorado General Assembly created the public trustee system to replace the private trustee system. Willis Carpenter, *A Brief History of Colorado's Public Trustee System (1894-2002)*, The Colorado Lawyer, pg. 72 (Feb. 2002). The Colorado public trustee system has been in place ever since. The intent of Colorado's legislators in creating a public trustee system with one public trustee for each of the sixty-four counties in Colorado was that the trustee would

no longer work at the direction of the lender, but rather, would be a neutral third party government employee designated to administer foreclosures in a fair and efficient manner. "[A] bonded, designated and permanent trustee was an attractive alternative to lenders and was equally acceptable to borrowers." *Id.*

While Colorado could have simply eliminated its private trustee system and required foreclosures to be handled through the courts like most of the states on the eastern part of the United States, Colorado specifically elected not to do so. Judicial foreclosure procedures tend to be longer, more expensive and burdensome to the court system. *See Plymouth Capital Co. v. District Court*, 955 P.2d 1014, 1015 (Colo. 1998). In addition, the expenses of long foreclosures become additional debt of the borrower. Accordingly, many western states have opted for non-judicial foreclosures because they offer a balanced and judicially efficient manner for lenders to recover collateral when borrowers default on underlying loans. These western states believe, and statistics confirm, that non-judicial foreclosure procedures encourage lending and economic growth because lenders are more willing to make loans when they are assured they can recover collateral in a timely fashion and foreclosure procedures that are not unduly long result in faster economic recovery after a downturn. As discussed *infra*, the efficient recovery of collateral, in turn, benefits borrowers by providing more accessible credit and higher housing values. While Colorado has had the option multiple times, and even had numerous bills proposed, to utilize the courts

for foreclosure instead of public trustees, the option has always been rejected. Carpenter, *supra*, at 72.

One of the commonalities of any non-judicial foreclosure, whether through a private trustee or Colorado's public trustee system, is the inability of the lender to obtain a judgment against the borrower through the foreclosure process itself. Common law has long recognized the difference between *in rem* and *in personam* claims. "The debt, or the *in personam* claim, consists of the action on the contract. . . . The lien is security for the debt, and the action to claim and foreclose a [mechanic's] lien is an *in rem* action, equitable in nature." *Mountain Ranch Corp. v. Amalgam Enterprises, Inc.*, 143 P.3d 1065, 1068 (Colo. App. 2005). In Colorado, much like other non-judicial foreclosure states that permit deficiency judgments, if a lender wishes to both foreclose on the security and obtain a monetary judgment against the borrower, it must either utilize a judicial foreclosure wherein both claims can be brought simultaneously or it must foreclose its deed of trust through the public trustee and then later initiate a separate action seeking a deficiency judgment. Geoffrey P. Anderson, *Colorado Methods of Practice, 2A Colo. Prac., Methods of Practice* § 75:1 (6th ed. 2018 update); Geoffrey P. Anderson, *Foreclosure Law in Colorado*, First Ed., CLE in Colo., Inc. (Richard H. Krohn, managing editor 2017).

Thus, when a lender elects to utilize the public trustee system in Colorado rather than foreclosing judicially, the lender opts to forgo obtaining a monetary

judgment against the borrower as part of the foreclosure process.

II. THE COLORADO PUBLIC TRUSTEE FORECLOSURE PROCESS

Colorado's well-codified foreclosure process is designed to provide protection for both lenders and borrowers. "It should be noted that the overwhelming success of the public trustee system indicates that it has provided the essential balance of procedural rights between borrowers and lenders. . . ." Carpenter, *supra*, pg. 73. The Colorado non-judicial foreclosure process can be found at Colo. Rev. Stat. §§ 38-38-100.3 *et seq.* and Colorado Rule of Civil Procedure 120 ("Rule 120"). The public trustee process is utilized for both consumer and business loans and employed whether the default under the terms of the loan documents is monetary or non-monetary.

A. THE COLORADO PRE-FORECLOSURE NOTICE

At least thirty days prior to initiating a foreclosure and at least thirty days after a default and only in the case of a monetary default under the terms of a deed of trust, Colo. Rev. Stat. § 38-38-102.5 requires that the holder of an evidence of debt constituting a residential mortgage loan, or the holder's loan servicer or other person acting on the holder's behalf mail a notice addressed to the original *grantor of the deed of trust*

(emphasis added) at the address in the recorded deed of trust or other lien being foreclosed and, if different, at the last address shown in the holder's records. The notice must contain three pieces of information:

> (a) The telephone number of the Colorado foreclosure hotline;
>
> (b) The direct telephone number of the holder's loss mitigation representative or department; and
>
> (c) A statement that it is illegal for any person acting as a foreclosure consultant to charge an upfront fee or deposit to the borrower for services related to the foreclosure.

Colo. Rev. Stat. § 38-38-102.5(2). This notice required by section 102.5 is referred to herein as the "Pre-Foreclosure Notice."

B. INITIATING THE FORECLOSURE

According to Colo. Rev. Stat. § 38-38-101, when the holder of an evidence of debt declares a violation of a covenant of a deed of trust and elects to publish all or a portion of the property therein described for sale, the holder of the evidence of debt or its attorney must file with the public trustee of the county where the property is located, several documents, including, among other documents:

> (a) A notice of election and demand for sale (NED);
>
> (b) The evidence of debt, including any modifications to the original evidence of debt (in some

cases the original evidence of debt is required and in others cases a copy is required);

(c) The original recorded deed of trust securing the evidence of debt;

(d) A combined notice (except that the combined notice may be omitted with the prior approval of the public trustee);

(e) A mailing list;

(f) the name of the loan servicer, if applicable;

(g) the name and address of the current owner of the property.

Colo. Rev. Stat. § 38-38-101(1).

C. THE NOTICE OF ELECTION AND DEMAND FOR SALE

Colo. Rev. Stat. § 38-38-101(4) details the information that must be contained in an NED filed with the public trustee. An NED must contain the following information:

(a) The names of the original grantors of the deed of trust being foreclosed and the original beneficiaries or grantees thereof;

(b) The name of the holder of the evidence of debt;

(c) The date of the deed of trust being foreclosed;

(d) The recording date, county, book, and page or reception number of the recording of the deed of trust being foreclosed;

(e) The amount of the original principal balance of the secured indebtedness;

(f) The amount of the outstanding principal balance of the secured indebtedness as of the date of the notice of election and demand;

(g) A legal description of the property to be foreclosed;

(h) A statement of whether the property described in the notice of election and demand is all or only a portion of the property then encumbered by the deed of trust being foreclosed;

(i) A statement of the violation of the covenant of the evidence of debt or deed of trust being foreclosed upon which the foreclosure is based;

(j) The name, address, business telephone number, and bar registration number of the attorney for the holder of the evidence of debt; and

(k) A description of any changes to the deed of trust described in the notice of election and demand that are based on an affidavit filed with the public trustee.

Colo. Rev. Stat. § 38-38-101(4).

No later than ten business days following the receipt of the NED, the public trustee is required to review the documents filed pursuant to section 38-38-101(1) and, if the filing is complete, cause the NED to be recorded in the office of the county clerk and recorder of the county where the property described in

the NED is located. The public trustee must also set the sale date between 110 and 125 days from the recordation of the NED for non-agricultural property and between 215 and 230 days from the recordation of the NED for agricultural property. Colo. Rev. Stat. § 38-38-108.

D. THE COMBINED NOTICE

No more than twenty calendar days after the public trustee records the NED, the public trustee is required to mail a Combined Notice to the persons set forth in the mailing list. (The Combined Notice gets its name because it is the combination of the formerly separate Notice of Sale and Notice of Rights to Cure and Redeem.) No more than sixty calendar days nor less than forty-five calendar days prior to the first scheduled date of sale, the public trustee shall again mail the Combined Notice to the persons as set forth in the most recent amended mailing list, or if no amended mailing list has been provided, to the persons on the mailing list.

The Combined Notice must contain the following information:

(a) The information required by section 38-38-101(4) which identifies the deed of trust being foreclosed;

(b) The statement: A notice of intent to cure filed pursuant to section 38-38-104 shall be filed with the officer at least fifteen calendar days prior to the first scheduled sale date or any date to which the sale is continued;

(c) The statement, which must be in bold: If the sale date is continued to a later date, the deadline to file a notice of intent to cure by those parties entitled to cure may also be extended;

(d) The statement: A notice of intent to redeem filed pursuant to section 38-38-302 shall be filed with the public trustee no later than eight business days after the sale;

(e) If applicable, the date to which the sale has been continued;

(f) The date of sale;

(g) The place of sale;

(h) The statement that the lien being foreclosed may not be a first lien; and

(i) A statement that, if the borrower believes that a lender or servicer has violated the requirements for a single point of contact in section 38-38-103.1 or the prohibition on dual tracking in section 38-38-103.2, the borrower may file a complaint with the Colorado attorney general, the CFPB, or both, but the filing of a complaint will not stop the foreclosure process. The notice must include contact information for both the Colorado attorney general's office and the CFPB.

Colo. Rev. Stat. § 38-38-103(4)(a). Along with the Combined Notice, the public trustee must send legible copies of the relevant statutory sections describing the Colorado statutory right to cure and right to redeem that various parties may have to those on the mailing list. In addition to the two required mailings of the Combined Notice, no more than sixty calendar days

nor less than forty-five calendar days prior to the first scheduled date of sale (unless a longer period of publication is specified in the deed of trust), the public trustee will commence publication of the Combined Notice for four weeks, which means publication once each week for five consecutive weeks. Colo. Rev. Stat. § 38-38-103(5).

E. THE RULE 120 NOTICE

Due to the fact that the public trustee facilitating the foreclosure is a government official, in order to afford borrowers their due process rights, Colo. Rev. Stat. § 38-38-105(2)(a) requires that whenever a public trustee forecloses upon a deed of trust, the holder of the evidence of debt or the attorney for the holder shall obtain an order authorizing sale from a court of competent jurisdiction to issue the same pursuant to Colorado Rule of Civil Procedure Rule 120 (Rule 120) or other rule of the Colorado Rules of Civil Procedure and present it to the public trustee no later than noon two business days before the sale date. Colo. Rev. Stat. § 38-38-105(2).

Rule 120 requires that when an order of court is desired authorizing a foreclosure sale under a power of sale contained in a deed of trust to a public trustee, the person entitled to enforce the deed of trust must file a verified motion in a district court seeking such order. In addition to the motion being filed with the court, Rule 120(b) requires that the holder of the evidence of debt issue a notice of response deadline stating:

> (1) a description of the deed of trust containing the power of sale, the property sought to be sold at foreclosure, and the facts asserted in the motion to support the claim of a default;
>
> (2) the right of any interested person to file and serve a response including the addresses at which such response must be filed and served and the deadline set by the clerk for filing a response;
>
> (3) the following advisement: "If this case is not filed in the county where your property or a substantial part of your property is located, you have the right to ask the court to move the case to that county. If you file a response and the court sets a hearing date, your request to move the case must be filed with the court at least 7 days before the date of the hearing unless the request was included in your response."; and
>
> (4) the mailing address of the moving party and, if different, the name and address of any authorized servicer for the loan secured by the deed of trust. If the moving party or authorized servicer, if different, is not authorized to modify the evidence of the debt, the notice shall state in addition the name, mailing address, and telephone number of the person authorized to modify the evidence of debt a representative authorized to address loss mitigation requests.

Colo. R. Civ. P. 120(b).

A copy of Rule 120 must be included with or attached to the Rule 120 Notice. The Rule 120 Notice must be served by the holder of the evidence of debt

not less than fourteen days prior to the response deadline set by the clerk, by:

(A) mailing a true copy of the notice to each person named in the motion (other than any person for whom no address is stated) at that person's address or addresses stated in the motion;

(B) filing a copy with the clerk for posting by the clerk in the courthouse in which the motion is pending; and

(C) if the property to be sold is a residential property as defined by statute, by posting a true copy of the notice in a conspicuous place on the subject property as required by statute.

The Rule 120 Notice must be served (by mailing) on the grantor of the deed of trust, the current record owner of the property to be sold, all persons known or believed by the moving party to be obligated on the debt secured by the deed of trust, those persons who appear to have an interest in such real property that is evidenced by a document recorded after the recording of the deed of trust and before the recording of the notice of election and demand for sale, or that is otherwise subordinate to the lien of the deed of trust; and those persons whose interest in the real property may otherwise be affected by the foreclosure. Colo. R. Civ. P. 120(b).

Colorado's Rule 120 process was originally enacted to assist in the determination of the military status of debtors, in compliance with what is now called

the Servicemembers' Civil Relief Act, 50 U.S.C. § 3953. *See generally Goodwin v. Dist. Court*, 779 P.2d 837, 840–42 (Colo. 1989) (summarizing history of the rule and its construction by Colorado Supreme Court). But in light of *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 342, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969), which held that constitutional due process required a judicial hearing before prejudgment garnishment of wages, in 1976, Rule 120 was expanded. The 1976 amendments to Rule 120 expanded the scope of Rule 120 to include the Rule 120 court making a determination if there was a reasonable probability of the existence of a default. Frederick B. Skillern, *Foreclosure Law in Colorado*, 87–88, First Ed., CLE in Colo., Inc. (Richard H. Krohn, managing editor 2017); *see also Goodwin* at 840–41. The scope of Rule 120 was expanded again in 2018 to be consistent with case law and now requires judicial review of not just the debtor's military status and the reasonable probability of the existence of a default authorizing exercise of a power of sale under the terms of the deed of trust, but also whether the moving party is the real party interest and whether the status of any request for a loan modification agreement bars a foreclosure sale as a matter of law. Colo. R. Civ. P. 120(d)(1).

F. THE BID AND THE FORECLOSURE SALE

No later than noon two business days prior to the sale date, the holder of the evidence of debt or its attorney must submit a written bid to the public trustee. Colo. Rev. Stat. § 38-38-106 provides a statutory form.

The holder of the evidence of debt is directed to bid at least the holder's good faith estimate of the fair market value of the property being sold, less the amount of unpaid real property taxes and all amounts secured by liens against the property being sold that are senior to the deed of trust or other lien being foreclosed and less the estimated reasonable costs and expenses of holding, marketing, and selling the property, net of income received; except that the holder need not bid more than the total amount due to the holder. Colo. Rev. Stat. § 38-38-106(6). Colorado law specifically provides that the failure of the holder of the evidence of debt to bid as described in section 106(6) does not affect the validity of the sale, but may be raised as a defense by any person sued on a deficiency. Any funds tendered at the sale are deposited with the public trustee and held by the public trustee until the expiration of all redemption periods and then are disbursed by the public trustee.

While the bid submitted to the public trustee pursuant to the Colorado foreclosure statutes may state or preserve a deficiency, a deficiency judgment is not entered and should a lender elect to pursue a deficiency judgment, a separate action must be brought. *See Bank of Am. v. Kosovich*, 878 P.2d 65, 66 (Colo. App. 1994).

ARGUMENT

A. THE PLAIN LANGUAGE OF FDCPA SUPPORTS THE CONCLUSION THAT NON-JUDICIAL FORECLOSURE IS NOT DEBT COLLECTION

FDCPA bars debt collectors from engaging in certain practices while attempting to collect debts. In defining "debt collector," the FDCPA draws a distinction between entities that primarily engage in "the collection of any debts," and entities that primarily engage in the "enforcement of security interests." 15 U.S.C. § 1692a(6). Entities that engage in the collection of any debts are "debt collectors" subject to the FDCPA for all purposes. Entities that primarily engage in the enforcement of security interests are only subject to FDCPA when their conduct involves "[t]aking or threatening to take any non-judicial action to effect dispossession or disablement of property if there is no present right to possession of the property claimed as collateral through an enforceable security interest; there is no present intention to take possession of the property; or the property is exempt by law from such dispossession or disablement." 15 U.S.C. § 1692f(6). The factors identified in 15 U.S.C. § 1692f(6) are not at issue in this case. Thus, in the absence of the factors outlined in section 1692f(6), the enforcement of security interests does not fall within the definition of debt collection.

While many courts have found that foreclosure in certain situations may constitute debt collection, there

is an obvious distinction between judicial foreclosure and non-judicial foreclosure. In judicial foreclosures, the lender may obtain a monetary judgment against the borrower and simultaneously enforce a security interest or the lender may opt to only enforce the security interest in a judicial foreclosure. Where a monetary judgment is sought against the debtor in that instance, a judicial foreclosure action may be subject to FDCPA. However, if a judicial foreclosure is employed solely as an *in rem* action to recover the secured property without a corresponding *in personam* judgment on the note, the FDCPA is not implicated. Likewise, in non-judicial foreclosures, where the lender does not obtain a monetary judgment against the borrower and is only enforcing a security interest, the FDCPA is inapplicable. For this reason, all of the decisions from various circuits concerning judicial foreclosure which include an *in personam* judgment are inapposite for purposes of this case. Under FDCPA, "debt" is defined as an "obligation . . . of a consumer to pay money." 15 U.S.C. § 1692a(5). "The purpose of a non-judicial foreclosure is to retake and resell the security, not to collect money from the borrower." *Ho v. ReconTrust Company, N.A.*, 858 F.3d 568, 571 (9th Cir. 2017). Thus, non-judicial foreclosure, by its very nature, does not constitute debt collection under the FDCPA as it is enforcing a security interest and recovering collateral as opposed to debt collection. *Diessner*, 618 F.Supp.2d at 1198. The *Ho* Court was correct when it found that "[t]he most plausible reading of the statute is that [the] foreclosure notices were the enforcement of a security interest as contemplated by section 1692f(6) rather than "debt collection" as

contemplated by section 1692a." *Ho* at 572. The same is true of Colorado non-judicial foreclosure. By the plain language of FDCPA, law firms handling non-judicial foreclosures are not engaged in debt collection.

This separation between a collection action and an enforcement action against a security interest is not new in the context of federal law. In fact, in enacting the United States Bankruptcy Code (11 U.S.C. § 101, *et seq.*), Congress recognized the distinction between debt collection and enforcement of a security interest. For example, the discharge injunction of 11 U.S.C. § 524(a)(2) enjoins creditors from commencing or continuing any act to collect, recover or offset any debt as personal liability of the debtor post-discharge. There is no corresponding prohibition against secured creditors with valid security interests pursuing *in rem* relief to enforce their liens against the property post-discharge. *See* 11 U.S.C. § 524(j).

In *Johnson v. Home State Bank*, this Court held that "[a] mortgage is an interest in real property that secures a creditor's right to repayment. But unless the debtor and creditor have provided otherwise, the creditor ordinarily is not limited to foreclosure on the mortgaged property should the debtor default on his obligation; rather, the creditor may in addition sue to establish the debtor's *in personam* liability for any deficiency on the debt and may enforce any judgment against the debtor's assets generally. A defaulting debtor can protect himself from personal liability by obtaining a discharge in a Chapter 7 liquidation. However, such a discharge extinguishes *only* 'the personal

liability of the debtor.'" *Johnson v. Home State Bank*, 501 U.S. 78, 82–83, 111 S.Ct. 2150, 2153 (1991) (internal citations omitted). The Code provides that a creditor's right to foreclose on the mortgage survives or passes through the bankruptcy. *Id.* at 83.

The same principle applies here – the creditor holding a secured interest has two remedies: collecting the debt from the borrower and enforcing the security interest. While obtaining a judgment against the borrower personally would be debt collection, a non-judicial foreclosure seeking enforcement against the security interest only is not debt collection and the FDCPA is not applicable.

B. NONE OF THE NOTICES THAT ARE REQUIRED FOR A COLORADO PUBLIC TRUSTEE FORECLOSURE ARE A DIRECT OR INDIRECT DEMAND FOR PAYMENT

1. THE COLORADO PRE-FORECLOSURE NOTICE IS NOT A DEMAND FOR PAYMENT

The Petitioner incorrectly states in his brief that "[a] non-judicial foreclosure directly attempts to collect a debt by threatening the foreclosure itself. The pre-foreclosure notices declare a default, provide information on how to cure that default, and lay out the devastating consequence of failing to pay – losing one's home. With or without an express demand for payment, the message is unmistakably clear. Consumers

are often left to cobble together any available funds to stave off foreclosure, and the notices serve as an obvious demand for payment." Pet. Br. pg. 12.

The Pre-Foreclosure Notice is clearly not a direct or indirect demand for payment. The Pre-Foreclosure Notice is quite simply a notice designed to direct homeowners to housing counselors and/or the lender's loss mitigation department and to alert homeowners to foreclosure scams disguised as foreclosure consultation or assistance programs.

It is important to note that the focus of the Pre-Foreclosure Notice is upon the "grantors" of a deed of trust. The Pre-Foreclosure Notice must be addressed and sent to "grantors" under the subject deed of trust, who have granted an interest in the real property that is the subject of the foreclosure to the public trustee rather than to the obligors on the debt. Oftentimes, one or more of the grantors are not obligors on the debt instrument. The grantors of a deed of trust are the record owners of the secured property or non-owner spouses at the time the deed of trust is executed; they are not necessarily synonymous with the individuals or entities that are obligating themselves to repay the debt.[2] A demand for payment would only be sent to those obligated on the debt. However, Colorado law specifically requires the Pre-Foreclosure Notice to be directed to

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[2] For example, when two spouses own the property, but only one is obligated on the debt secured with the property or when a parent who does not own the property co-signs the loan for a child and is thus obligated on the debt.

grantors under the deed of trust rather than to obligors on the debt.

2. THE NOTICE OF ELECTION AND DEMAND FOR SALE IS NOT A DEMAND FOR PAYMENT

The NED is a notice to the public that the public trustee has initiated a foreclosure action with respect to the deed of trust identified in the NED. The NED is not mailed or served; it is simply recorded in the public records, by the public trustee, to put the public on notice of the pending sale. The NED does not demand that anybody pay the amount owed. The NED states the original and current principal balance due on the debt to assist parties with an interest in the subject property in determining if there may be equity in the property that would make filing an intent to redeem beneficial. The NED describes the deed of trust being foreclosed, identifies the grantors of the deed of trust, identifies the property that is to be sold, identifies the current holder of the evidence of debt and describes the violation of the deed of trust that has triggered the public trustee's power of sale, which may be a monetary default or a non-monetary default. Colo. Rev. Stat. § 38-38-101(4). Further, the recording of the NED is initiated by the public trustee, not the law firm representing the foreclosing holder of the evidence of debt.

3. THE RULE 120 NOTICE IS NOT A DEMAND FOR PAYMENT

Like the Pre-Foreclosure Notice, the NED and the Combined Notice mailed and published by the public trustee, the Rule 120 Notice is not a demand for payment. The Rule 120 Notice advises the obligors on the debt, grantors of the deed of trust, junior lien holders and other interested parties that a motion requesting an order authorizing sale has been filed with the court, that a response deadline has been set on the motion and that if parties wish to file a response, they must do so by the deadline. Similar to the Combined Notices, the Rule 120 Notice is sent to multiple parties that are not obligated on the debt and is merely advising interested parties of their rights. The language in the Rule 120 Notice is mandatory. There is absolutely no direct or indirect demand for payment.

C. FORECLOSURE IS A MATTER OF STATE LAW

As evidenced by the fact that every state has its own unique process, foreclosure is a matter of state law. This Court has repeatedly held that real estate title and foreclosure are matters of state law and that to displace state regulation in this area, the legislative purpose must be "clear and manifest." In *BFP v. Resolution Trust Corp.*, this Court stated that "[f]ederal statutes impinging upon important state interests 'cannot . . . be construed without regard to the implications of our dual system of government. . . . [W]hen the Federal Government takes over . . . local radiations

in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit.'" *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544, 144 S.Ct. 1757, 1764–65 (1994) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum.L.Rev. 527, 539–540 (1947), quoted in *Kelly v. Robinson*, 479 U.S. 36, 49–50, n. 11, 107 S.Ct. 353, 360–362, n. 11, 93 L.Ed.2d 216 (1986)). This Court has consistently held that the security of the titles to real estate is a state concern and that "the power to ensure that security [of titles to real estate] inheres in the very nature of state government." *BFP* at 544 (quoting *American Land Co. v. Zeiss*, 219 U.S. 47, 60, 31 S.Ct. 200, 204 (1911)).

In *Nobleman v. American Sav. Bank*, this Court stated that "[i]n the absence of a controlling federal rule, we generally assume that Congress has left the determination of property rights . . . to state law, since such property interests are created and defined by state law." *Nobleman v. American Sav. Bank*, 508 U.S. 324, 329, 113 S.Ct. 2016, 2109 (1993) (citing *Butner v. United States*, 440 U.S. 48, 54–55, 99 S.Ct. 914, 918, 59 L.Ed.2d 136 (1979)). The *Nobleman* Court found that "the justifications for application of state law are not limited to ownership interests, but apply with equal force to security interests, including the interest of a mortgagee" including the right to foreclose. *Id.*

Petitioner argues in his brief that "Congress already instructed courts how to resolve any possible incompatibilities in this area: Section 1692n says that

inconsistent state laws are preempted to the extent they provide lesser coverage." Pet. Br. pg. 14. However, following Petitioner's line of reasoning, Colorado lawyers seeking to enforce a security interest pursuant to the public trustee foreclosure laws rather than seeking a money judgment against the borrower would be violating federal law.

As discussed *supra*, Rule 120 is peculiar to Colorado. While most states with a non-judicial foreclosure process do not have any court involvement, because Colorado is the only state to utilize public trustees rather than private trustees, the Rule 120 process provides the due process protections that are essential to citizens. Rule 120 requires: 1) that the notice of response deadline be mailed to numerous parties other than obligors on the underlying debt instrument; and 2) that the notice of response deadline be posted on the front door or other conspicuous place of the subject property. Colo. R. Civ. P. 120(b). Specifically, Rule 120(b) requires that the Notice of Response Deadline be mailed to the grantor(s) of the deed of trust, the current record owner(s) of the property to be sold, all persons known or believed by the moving party to be obligated on the debt secured by the deed of trust, those persons who appear to have an interest in such real property that is evidenced by a document recorded after the recording of the deed of trust and before the recording of the notice of election and demand for sale, or that is otherwise subordinate to the lien of the deed of trust; and those persons whose interest in the real property may otherwise be affected by the foreclosure.

15 U.S.C. § 1692c(b) prohibits debt collectors from communicating about the debt with parties other than the consumer, his or her attorney, and consumer reporting agencies if otherwise permitted by law. In addition, FDCPA mandates that a debt collector must cease all direct communications with the borrower when the collector knows the borrower is represented by an attorney, *see* 15 U.S.C. § 1692c(a)(2).

If FDCPA applies to Rule 120 Notices, which do not seek a monetary judgment from the borrower, it creates the classic catch-22 scenario; a law firm complying with FDCPA's prohibition on communicating with any persons other than the debtor and his or her attorney could not simultaneously comply with the Rule 120 notice requirements. If the law firm does not comply with Rule 120, it cannot move forward with the public trustee foreclosure sale as an order authorizing sale is required prior to the public trustee foreclosure sale. Colo. Rev. Stat. § 38-38-105. Thus, if FDCPA applies to these communications, lenders cannot foreclose through the public trustee system in Colorado, seemingly the result that Petitioner is seeking (and ignoring the fact that he has retained the collateral at the expense of the lender and has been in default since 2009). When viewed in light of the other arguments presented, Petitioner seeks to have this result applied nationwide. This result would fly in the face of this Court's stance on refraining from intervention in state judicial procedures absent "clear and manifest" congressional intent. This result is even more absurd given that Rule 120 and the posting requirement in

particular, were created to provide additional protections for consumers. Further, mandating that Rule 120 Notices comply with FDCPA will result in a "real and unavoidable" conflict in Colorado, just as it has in Michigan. *See Amicus Brief of Michigan Creditors Bar Association Brief, p. 10.* Nothing in FDCPA's legislative purpose provides that it was intended to supplant a state's control over its foreclosure process.

D. PUBLIC POLICY FAVORS NON-JUDICIAL FORECLOSURE

Contrary to statements in the *amicus* brief filed by NAACP Legal Defense and Education Fund, Inc., foreclosure rates in states with non-judicial foreclosure are not significantly higher than in states that permit only judicial foreclosure. *NAACP Amicus Brief, p. 5.* In fact, statistics confirm the opposite is true. According to RealtyTrac (a real estate information company), the top five states with the highest foreclosure rates in September 2018 (in order) were: Delaware, New Jersey, Maryland, Connecticut and Florida. RealtyTrac, https://www.realtytrac.com/statsandtrends/foreclosuretrends/ (website last visited Nov. 11, 2018). Of the top five states, all states utilize judicial foreclosures except Maryland (and Maryland is more properly described as "quasi-judicial" given the control the judiciary has over parts of the foreclosure process). *Id.* Similarly, a study performed by Bankrate found the following ten states topped the foreclosure charts in October 2017: Delaware, New Jersey, Maryland, Connecticut, Illinois,

Ohio, South Carolina, Florida, and New York. Claes Bell, CFA, *Top 10 States for Foreclosure*, Bankrate (Oct. 23, 2017), https://www.bankrate.com/finance/real-estate/top-10-states-for-foreclosure-1.aspx#slide=1. Nine of the ten states with the highest foreclosure rates in 2017 utilize judicial foreclosures. On the other hand, Experian reported that in 2017, the ten states with the lowest foreclosure rates are as follows (in order): South Dakota, North Dakota, Vermont, West Virginia, Montana, Colorado, Idaho, Mississippi, Kansas and Texas. *Do You Live in One of the 10 States With the Lowest Foreclosure Rates in the U.S.*, Experian, https://www.experian.com/blogs/ask-experian/do-you-live-in-one-of-the-10-states-with-the-lowest-foreclosure-rates-in-the-us/ (last visited Nov. 11, 2018). Of the ten states with the lowest foreclosure numbers, seven primarily utilize non-judicial foreclosure procedures.

In a 2012 article, titled *Housing Markets Recover Faster in Non-judicial Foreclosure States, Report Says*, HousingWire wrote that how fast a state recovers from a downturn is linked to whether the foreclosure process is judicial or non-judicial. Kerri Ann Panchuk, *Housing Markets Recover Faster in Non-Judicial Foreclosure States, Report Says*, HousingWire (May 18, 2012), https://www.housingwire.com/articles/housing-markets-recover-faster-nonjudicial-foreclosure-states-report-says. Basing the article on a report issued by Paul Diggle, property economist for Capital Economics, HousingWire stated that "[t]he crux of the report is that non-judicial foreclosure markets are performing better in terms of price stabilization." *Id.* ("Paul Diggle, property economist for Capital Economics, cited data

Friday from the Federal Housing Finance Agency index, showing home price growth in the fourth quarter of 2011 declining 0.3% from the previous quarter within judicial foreclosure states and 2.3% from year-ago levels. On the other hand, home prices grew 0.3% in non-judicial foreclosure states quarter-over-quarter while falling a slight 1.6% over the previous year.") *See also A World of Difference: Recovery in Judicial States vs. Non-Judicial States.* Safeguard Industry Update (Feb. 24, 2016), https://safeguardproperties.com/a-world-of-difference-recovery-in-judicial-vs-non-judicial-foreclosure-states/ (comparing the recovery in Cleveland to Phoenix). Similarly, the Mortgage Bankers Association produced an article in 2016 entitled *ProTeck: Recovery Between Judicial, Non-Judicial Foreclosure States Remains Stark*, which cites to a study by ProTeck, a national valuation company, which compared the economic recovery in numerous cities across the country and found that despite falling foreclosure rates, the difference between states that utilize judicial foreclosures compared to those that minimize court actions is "stark" in terms of recovery rates. Mike Sorohan, *ProTeck: Recovery Between Judicial, Non-Judicial Foreclosure States Remains Stark*, MBA Newslink (Mar. 4, 2016), https://www.mba.org/mba-newslinks/2016/march/mba-newslink-friday-3-4-16/residential/pro-teck-recovery-between-judicial-non-judicial-foreclosure-states.

During 2007, the Colorado Division of Housing reported 39,920 foreclosures filed in Colorado. *Colorado Division of Housing, 2nd Q 2018 Foreclosure Report*, https://www.colorado.gov/pacific/dola/foreclosure-reports-and-statistics (last visited Nov. 11, 2018). During 2008,

the Division reported 39,333 foreclosures filed. The height of the foreclosure rate in Colorado came in 2009, when the Division reported 46,394 foreclosures filed. From 2010 on, the foreclosure rate in Colorado dropped each year from the 2009 high. In 2017, the Division reported 6,680 foreclosures filed in Colorado. The Division has reported that in the first two quarters of 2018, Colorado has seen the lowest number of foreclosure filings since the Division began recording quarterly foreclosure activity. *Id.* According to Experian, as of midway through 2018, Colorado now has the fifth lowest foreclosure volume in the United States. O'Connell, *supra.* While certainly there are numerous factors involved in what drives foreclosure numbers up or down, those who have studied it agree that an efficient foreclosure process results in a faster housing recovery.

CONCLUSION

For the reasons stated above, the Court should affirm the Tenth Circuit's holding that Respondent was not engaged in debt collection for purposes of the FDCPA when it initiated a non-judicial foreclosure to enforce a security interest under Colorado law.

Dated: November 14, 2018.

Respectfully submitted,

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No. 17-1307

IN THE

Supreme Court of the United States

DENNIS OBDUSKEY,

Petitioner,

v.

MCCARTHY & HOLTHUS, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE COMMERCIAL LAW LEAGUE OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Commercial Law League of America (CLLA), founded in 1895, is the nation's oldest organization of attorneys and other experts in credit and finance and actively engaged in the field of commercial law, bankruptcy and reorganization. The League's membership, which numbers over 1,000 professionals, includes attorneys from large and small firms and bankruptcy judges in virtually every state and consists of representatives of divergent interests in bankruptcy cases. The CLLA has been associated with the representation of creditor interests, while at the same time seeking fair, equitable and efficient administration of bankruptcy cases for all parties in interest.

The ruling underlying this appeal correctly refused to expose the attorney and law firm members of the *Amicus*, and many clients of those members, to individual and class action claims under the FDCPA. The *Amicus* has a direct interest in this litigation. The organization has authorized the filing of this brief

SUMMARY OF ARGUMENT

In *BFP v. Resolution Trust Corporation*, 511 U.S. 531, 533 (1994), this Court announced a rule of statutory

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1. As provided for in U.S. SUP. CT R 37(6) the *Amicus* states that: .(a) no party's counsel authored this brief in whole or in part; no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief; and (c) no person—other than the *Amicus Curiae*, its members, and its counsel—contributed money to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

construction that absent an explicit legislative command, federal statutes should not intrude upon matters of traditional state concern. Like this case, *BFP* involved mortgage foreclosures under state law. In *BFP*, the Court found that the term "reasonably equivalent value" in the Bankruptcy Code should not be interpreted in a manner that would upset non-collusive foreclosure sales under state law. In this case, the *Amicus* submits that the terms "debt collector" and "debt collection" should not be interpreted to add additional burden to non-judicial foreclosure actions under state law without an explicit mandate which is absent here. The Tenth Circuit's construction of the term "debt collector" keeps the Fair Debt Collection Practices Act from pre-empting applicable state law in areas traditionally reserved to the States and thus fulfills an important role in our federal system.

ARGUMENT

INTRODUCTION

This case concerns whether the FDCPA applies to a non-judicial foreclosure sale in Colorado. Respondent McCarthy & Holthus sent Petitioner Obduskey a notice initiating a foreclosure. Obduskey wrote back disputing the debt. Obduskey claimed that McCarthy & Holthus continued to proceed with the foreclosure without verifying the debt, which would have been required if the FDCPA applied. Obduskey filed an FDCPA action against both Wells Fargo, the loan servicer, and McCarthy & Holthus, the law firm. The District Court dismissed the suit, finding that "foreclosure proceedings are not a collection of a debt." *Obduskey v. Wells Fargo*, 2016 U.S. Dist. LEXIS 103281 (D. Col. 2016) at *9. The Tenth Circuit

affirmed, holding that "the FDCPA does not apply to non-judicial foreclosure proceedings in Colorado." *Obduskey v. Wells Fargo*, 879 F.3d 1216, 1219 (10th Cir. 2018).

The Commercial Law League of America believes that the lower courts were correct. It submits this *amicus* brief to highlight a single point: that this Court's precedent in *BFP v. Resolution Trust Corporation* provides an important guide for interpreting the FDCPA in a manner which will not interfere with non-judicial foreclosure proceedings established under state law. If the Court has a choice between an interpretation of the FDCPA which burdens state law foreclosure remedies or one which does not, it should choose the latter. To use the vernacular, the federal government should stay in its lane when there is a strong state interest and a weak federal purpose.

In *BFP v. Resolution Trust Corporation*, this Court held that "the consideration received from a non-collusive, real estate mortgage foreclosure sale conducted in conformance with applicable state law" conclusively satisfied the requirement that a transfer be made in exchange for "reasonably equivalent value" under the Bankruptcy Code.

In making this ruling, the Court interpreted 11 U.S.C. § 548 in a manner which would not interfere with state regulatory systems absent an express federal mandate.

> Federal statutes impinging upon important state interests "cannot . . . be construed without regard to the implications of our dual system of government. . .When the Federal Government takes over . . . local radiations in the vast

> network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit." Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 539-540 (1947), quoted in *Kelly v. Robinson*, 479 U.S. 36, 49-50, n. 11, 93 L. Ed. 2d 216, 107 S. Ct. 353 (1986).

Id. at 544. The Court also stated:

> Absent a clear statutory requirement to the contrary, we must assume the validity of this state-law regulatory background and take due account of its effect. "The existence and force and function of established institutions of local government are always in the consciousness of lawmakers and, while their weight may vary, they may never be completely overlooked in the task of interpretation

Id. at 539-40.

This case also involves statutory interpretation, specifically whether the FDCPA's cease communications requirement applies in the context of a non-judicial foreclosure. Just as a silent federal statute did not preempt a compelling state interest in *BFP*, the same result should apply in this case. The FDCPA does not explicitly apply to non-judicial foreclosures. As in *BFP*, the state interest in crafting and protecting its own system of property should prevail over an ambiguous provision in a federal statute.

I. States Have a Substantial Interest in Regulating Non-Judicial Foreclosures and the Practice of Law

As this Court recognized in *BFP*, states have a substantial interest in regulating mortgage foreclosure procedures. Justice Scalia wrote that:

> It is beyond question that an essential state interest is at issue here: We have said that "the general welfare of society is involved in the security of the titles to real estate" and the power to ensure that security "inheres in the very nature of [state] government."

BFP, at 544. The methods by which states allow title to pass in a real estate foreclosure reflect their individual policy choices and vary widely from state to state. Colorado utilizes a public trustee to conduct foreclosure sales. See Brief of Respondent', p. 5. Texas follows a dual-track system. Generally, foreclosure sales may be conducted by a private trustee on the first Tuesday of the month provided that the borrower receives 21 days' advance notice. Tex. Prop. Code §51.002. However, before a home equity loan may be foreclosed, there must be a court order entered authorizing the foreclosure followed by the usual procedure. Tex. Const. Art. XVI, § 50(a)(6) and TEX.R.CIV.P. 736.

Compared to the relatively simple procedures followed by Texas, Minnesota has a much more elaborate system. In Minnesota, a person wishing to foreclose must file a notice of pendency with the county recorder or registrar of titles prior to the sale being advertised but not more than six months before the first notice of publication. Minn.

Stat. Ann. § 580.032(3). This is followed by publication in a qualified newspaper for six weeks. The foreclosing party must also serve notice of foreclosure sale on the person in possession of the property in the same manner as a summons at least four weeks prior to the foreclosure. Minn. Stat. Ann. §580.03. A foreclosure may be postponed for either five months or eleven months by filing an affidavit, although postponement reduces the period for equity of redemption. Minn. Stat. Ann. §580.07. See also *Ruiz v. 1st Fid. Loan Servicing, LLC*, 829 N.W.2d 53 (Minn. 2013).

Other states, such as Ohio, do not allow non-judicial foreclosures at all. Ohio Rev. Code Ann. § 2323.07. *Wells Fargo Bank, N.A. v. Young*, 2011 Ohio App. LEXIS 102 (Ohio App. 2nd Dist. 2011).

Laying the requirements of the FDCPA on top of the requirements of state law would alter the policy determinations of the state legislatures as to whether foreclosure should be swift (as in Texas) or prolonged (as in Minnesota). As explained by Respondent in their brief, the cease collection requirement of 15 U.S.C. § 1692g(b) would preclude giving the notices required by Colorado law until the debt has been verified. The non-judicial remedy would become a remedy virtually always litigated (and often in federal court), which would undermine the less costly, non-judicial foreclosure scheme created by the States.

In this case, one of the parties being sued under the FDCPA was the law firm which initiated the non-judicial foreclosure. States have a strong interest in regulating attorneys licensed to practice in their jurisdictions. The practice of law has long been held to high standards.

Courts may prescribe standards for admission to the bar and prevent the unauthorized practice of law by the lay public. *Leis v. Flynt*, 439 U.S. 438 (1979).

Courts also promulgate codes of professional conduct for attorneys. The Colorado Supreme Court has adopted the Colorado Rules of Professional Conduct. These rules establish duties in dealing with third parties, even outside of a judicial proceeding. A Colorado attorney is not allowed to knowingly "make a false statement of material fact or law to a third person." Colorado Rules of Professional Conduct 4.1(a). When dealing with a person who is not represented by counsel, a Colorado attorney may not "state or imply that the lawyer is disinterested" and "shall not give legal advice to an unrepresented person, other than the advice to secure counsel." Colorado Rules of Professional Conduct 4.3. Violation of these rules can lead to discipline of the attorney involved.

Just as states have a strong interest in regulating foreclosure sales, they also have a strong interest in regulating attorneys. This is another reason to take a narrow interpretation of whether the FDCPA applies to attorneys conducting non-judicial foreclosure sales. Specifically, states can be expected to regulate the attorneys practicing in their jurisdictions and avoid the abuses the FDCPA was intended to prevent. While the Court has previously ruled that the FDCPA applies to attorneys engaging in debt collection generally, *Heintz v. Jenkins*, 514 U.S. 291 (1995), the Court should consider the ability of states to regulate attorneys in deciding what constitutes debt collection.

II. The FDCPA Does Not Explicitly Apply to Non-Judicial Foreclosure Remedies

When Congress adopted the FDCPA, it found that "(t)here is abundant evidence of the use of abusive, deceptive, and unfair collection practices by many debt collectors" and that "(e)xisting laws and procedures for redressing these injuries are inadequate to protect consumers." 15 U.S.C. § 1692 (a) and (b). In adopting the statute, Congress stated that it intended to step in where existing laws and procedures were inadequate or non-existent. While this was the case with regard to debt collection activities in general, it was not the case with non-judicial foreclosure remedies which are governed by an established and detailed set of state laws.

The statute regulates "debt collectors" who are defined as:

> any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.

15 U.S.C. § 1692a(6). A "debt" is an "obligation or alleged obligation of a consumer to pay money." 15 U.S.C. § 1692a(5).

The text of the FDCPA does not establish the requisite intent to regulate non-judicial foreclosure remedies. As explained by Respondent in their brief, there is a

distinction between seeking to collect money from a consumer on the one hand, which is governed by the FDCPA, and enforcing a lien against real property.

There are two provisions of the FDCPA which refer to actions taken to enforce security interests or liens. Section 1692i(a)(1) states that venue of an action brought to "enforce an interest in real property securing the consumer's obligation" must be brought in the judicial district where the real property is located. This provision applies to judicial proceedings and is not applicable to non-judicial foreclosure remedies. Section 1692f(6) provides that it is an unfair practice for a "debt collector" to take or threaten to take a non-judicial action to "effect dispossession or disablement of property" when there is not a present right to take possession of the property, there is no intent to take possession or the property is exempt by law from being seized. This subsection expands the definition of who is a debt collector but only for the limited purpose of §1692f(6), a provision which is not at issue in this case. These two provisions do not establish the requisite intent to displace state laws and remedies regarding non-judicial foreclosure remedies.

Similarly, the legislative history does not show an intent to apply the FDCPA to non-judicial foreclosure proceedings. As explained by Respondent in their brief, Congress considered two bills, one of which would have applied to "the collection of any debt or the enforcement of security interests." Brief of Respondent, p. 25. Congress did not adopt that bill. Instead, it adopted the more limited language of 15 U.S.C. § 1692f(6) which prohibits misleading actions by debt collectors in connection with security interests. The evidence is that Congress

considered extending the FDCPA to enforcement of security interests, which would have included non-judicial foreclosure remedies, but decided against it.

III. There Is Not a Sufficient Federal Interest to Apply the FDCPA to State Law Non-Judicial Foreclosure Remedies

In *BFP*, this Court narrowly construed the term "reasonably equivalent value" to prevent state law foreclosure procedures from being undermined by a federal law, namely the Bankruptcy Code. Now the Court has another case in which a federal statute could affect state law foreclosure procedures. Once again, states have a strong interest in designing their laws to transfer real estate following a default in a manner consistent with the policy choices of the state. While the interests of federalism should not overrule a clear federal enactment, there is not a clear legislative command under the FDCPA. This Court can and should adopt a construction of the FDCPA which keeps it in its lane, protecting consumers from abusive efforts to collect money. States, on the other hand, should be allowed to make their own judgments about what procedures should be followed in a non-judicial foreclosure remedy. If states believe that a debt verification provision, such as the one contained in 15 U.S.C. § 1692g(b) is desirable in connection with real estate foreclosures, they should be allowed to make that decision and should be allowed to adopt a verification procedure that makes sense in the foreclosure context.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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IN THE
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DENNIS OBDUSKEY,
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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

AMICUS BRIEF OF LEGAL LEAGUE 100 IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS

The Legal League 100 ("Legal League") is a national professional association comprised of more than 100 financial services law firms that are committed to supporting the mortgage servicing industry through education, communication, relationship development, and advisory services.[1] Legal League is a driving force for industry standards, market research and policy change, holding annual summits and frequent webinars to educate its members on trending issues in the mortgage servicing industry. Most recently, the Legal League hosted a webinar titled Complex Default Litigation focusing on issues being litigated under the Unfair, Deceptive, or Abusive Acts or Practices ("UDAAP"), Fair Debt Collection Practices Act ("FDCPA"), Real Estate Settlement Procedures Act ("RESPA"), and complex foreclosure rules. FDCPA application remains a focus for the mortgage servicing industry in trying to navigate the non-judicial foreclosure process.

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[1]Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission. The counsel of record received timely notice of the intent to file the brief under this Rule and consent was granted.

SUMMARY OF THE ARGUMENT

Debt collection is the collection of debts, by anyone who regularly collects or attempts to collect, debts owed to another. Debt is an obligation of a consumer to pay money. Law firms that engage in non-judicial foreclosures do not collect a debt as defined by the FDCPA. These firms' issue, record, post, publish foreclosure notices and conduct a foreclosure sale all of which are activities that do not fall under the scope of the FDCPA. The FDCPA, under 15 USC §1692 (e) serves three purposes: a) to eliminate abusive debt collection practices by debt collectors; b) insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged; and c) to promote consistent State action to protect consumers against debt collection abuses. Law firms that engage in non-judicial foreclosures do not seek to collect money from the consumers. Simply put, these firms seek to collect proceeds from the trustee sale.

Non-judicial foreclosures, unlike judicial foreclosures, eliminate deficiency judgments wherein a court mandates the borrower to pay the lender any remaining balance due on the note after the foreclosure sale has concluded. Additionally, judicial foreclosures can take years upon which to foreclose versus non-judicial foreclosures that can take between three and six months. The time saved by lenders that utilize the non-judicial foreclosure process ultimately results in savings to the borrower. In a non-judicial foreclosure, there are limited costs, absent the court's involvement.

In a non-judicial foreclosure, the third party who normally handles the foreclosure process is commonly known as the foreclosure trustee or the

foreclosure attorney. While each state is different, a foreclosure trustee can be an attorney, or a business entity. The goal of the foreclosure trustee is to manage the foreclosure process by maintaining impartiality and not representing either side. The state of North Carolina went so far as to prohibit attorneys, who act as a trustee, from also representing lenders while initiating a foreclosure proceeding. In essence, the requirement that the foreclosure trustee or attorney remains neutral is paramount.

Law firms that engage in non-judicial foreclosures are tasked with pursuing proceeds from a trustee sale which are used to reduce the debt owed on the mortgage. Issuing, recording, mailing, publishing, posting and conducting a foreclosure sale do not induce payment from a consumer. These law firms operate in accordance with state laws to manage the foreclosure process. This practice is not debt collection under FDCPA, wherein the interpretation of debt collection, according to case law, rests on seeking payment from a consumer. In this case, the Petitioner alleges he was attempting to obtain information from the foreclosure attorney regarding the facts about the status of his mortgage account, alleging that the McCarthy law firm, in its trustee role, should have complied with FDCPA. However, FDCPA does not apply to non-judicial foreclosure activities because the activities themselves do not constitute debt collection. The intent of enacting FDCPA was not to run contrary with state laws.

In most states, it is impossible for foreclosure trustees or attorneys *not* to violate FDCPA when state laws requirements for managing the

foreclosure process require disclosure of certain account information of the mortgaged debt to the general public. Public policy considerations should focus on the possibility of opening the flood gates to a plethora of lawsuits against law firms that engage in non-judicial foreclosures for complying with state laws that contradict FDCPA regulation.

ARGUMENT

I. Introduction Non-Judicial Foreclosures and FDCPA

At issue in this action is whether the non-judicial foreclosure process and the act of conducting a trustee's sale qualify as "debt collection" under the Fair Debt Collection Practices Act ("FDCPA" or the "Act"). To fully understand this issue, one must have a general understanding about the non-judicial foreclosure process. While the laws governing the process vary from state to state, the foreclosure process generally commences with the issuance of the first foreclosure notice following the borrower's default under the Note[2] and Deed of Trust,[3] commonly referred to as the Notice of Default. The Notice of Default is recorded in the appropriate county by the entity responsible for conducting the foreclosure process – commonly known as the foreclosure trustee or the foreclosure attorney (hereinafter the "trustee"). Following the issuance of the Notice of Default, as a rule, the trustee issues, mails, records, publishes and posts on the property a second foreclosure notice, commonly referred to as the Notice of Sale. If the sale is not subsequently postponed, on the date listed in the Notice of Sale,

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[2] The Note is a contract that represents a personal promise of a borrower to repay a loan. A non-judicial foreclosure is not in any way seeking the enforcement (or collection) of this personal obligation.

[3] The Deed of Trust is a contract wherein a borrower conveys a security interest (lien) to the lender. The enforcement of the terms of the Deed of Trust against the real property does not give rise to any personal liability or personal obligation of the borrower.

the trustee sells the property at an auction to the highest bidder.

Based on this brief explanation and for the reasons explained below, the Legal League amicus submits that the process of non-judicially foreclosing on real property – *i.e.*, the issuance, recording, posting, and publication of foreclosure notices and the act of conducting the sale – does not fall within the provisions of the FDCPA. Legal League's position is predicated on the analysis of two issues: (1) whether mortgage loans qualify as debt under the Act – likely; and (2) whether non-judicial foreclosure amounts to "collection" of that debt – no.

II. Rationale Behind Enactment of the FDCPA

In 1977, based on the "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors," Congress enacted the FDCPA to eliminate abusive debt collection practices by unscrupulous debt collectors while, at the same time, protecting ethical debt collectors from unnecessary restrictions. Senate Report No. 95-382, p.p. *1-2 (Aug. 2, 1977); 15 U.S.C. § 1692(a) and (e). Congress reasoned that the legislation was necessary because the abusive debt collection practices – such as "[d]isruptive dinnertime calls, downright deceit, and more," including "obscene or profane language, threats of violence, ... misrepresentation of a consumer's legal rights, disclosing a consumer's personal affairs to friends, neighbors, or an employer, obtaining information about a consumer through false pretense, impersonating public officials and attorneys, and simulating legal process..." – all contributed to "personal bankruptcies, to marital instability, to the

loss of jobs, and to invasions of individual privacy." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1720, 198 L.Ed.2d (2017); Senate Report No. 95-382, *supra*, p.2; 15 U.S.C. § 1692(a).

Most notably, Congress found the legislation was necessary because the existing laws and procedures were inadequate to protect individual consumers from the above-referenced practices and that the debts could be adequately collected through means other than abusive collection practices. 15 U.S.C. § 1692(b) and (c); Report No. 95-382, p.p. 2-3. As such, the Act prohibits "'abusive, deceptive, and unfair debt collection practices,' such as late-night phone calls or falsely representing to a consumer the amount of debt owed." *Obduskey v. Wells Fargo*, 879 F.3d 1216, 1219 (10th Cir.) [citing 15 U.S.C. §§ 1692(a), 1692c, and 1692e]; *see also*, *Heintz v. Jenkins*, 514 U.S. 291, 292, 115 S. Ct. 1489, 131 L.Ed.2d 395 (1995) ["The Act says, for example, that a 'debt collector' may not use violence, obscenity, or repeated annoying phone calls, 15 U.S.C. § 1692d; may not falsely represent 'the character, amount, or legal status of any debt,' § 1692e(2)(A); and may not use various 'unfair or unconscionable means to collect or attempt to collect' a consumer debt, § 1692f."]

As discussed below, the process of non-judicially foreclosing does not involve the type of abusive debt collection practices that Congress sought to curtail. Moreover, Congress's reservations concerning inadequacy of the state-specific laws at the time of passing of the FDCPA are unfounded, as each of the non-judicial foreclosure states enacted laws which protect individual borrowers. *See, e.g., Yvanova v. New Century Mortg. Corp.*, 62 Cal.4th 919, 926-27,

365 P.3d 845 (2016) [providing an overview of protections afforded to the borrowers under California non-judicial foreclosure laws and explaining that "[t]he nonjudicial foreclosure system is designed to provide the lender-beneficiary with an inexpensive and efficient remedy against a defaulting borrower, while protecting the borrower from wrongful loss of the property"]; *U.S. Bank Nat. Ass'n v. Castro*, 131 Haw. 28, 39, 313 P.3d 717 (2013) [explaining that "the nonjudicial foreclosure process should protect the debtor from a wrongful loss of property"]; *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 93-94, 285 P.3d 34 (2012) [providing an overview of protections afforded to the borrowers under Washington non-judicial foreclosure laws]; *Brandrup v. ReconTrust Co.*, 353 Or. 668, 677-78, 303 P.3d 301 (2013) [same under Oregon laws]; *Patton v. First Fed. Sav. & Loan Ass'n of Phoenix*, 118 Az. 473, 477, 578 P.2d 152 (1978) [explaining that under Arizona law, "lenders must strictly comply with the Deed of Trust statutes, and the statutes and Deeds of Trust must be strictly construed in favor of the borrower"].

III. On Its Face, the Act Does Not Apply to Non-Judicial Foreclosures.

In their respective briefs, the Members of Congress and the National Consumer Law Center *amici* (collectively, "NCLC *amici*") and the Petitioner argued that the FDCPA applies to non-judicial foreclosures because the act of selling the collateral serving as security for a mortgage loan at a private foreclosure sale in order to satisfy the delinquent borrower's mortgage loan constitutes either *direct* or *indirect* collection of the debt. (NCLC *amici* and Petitioner are collectively referred to as the

"Petitioners".) Petitioners' interpretation of the Act is incorrect. The Act applies only to "debt collectors" who "collect" "debt." *Obduskey*, at 1219. Thus, to come within the provisions of the FDCPA, all three prongs must be satisfied – the underlying obligation must qualify as "debt," the entity/person trying to obtain it must be a "debt collector" and the activity must qualify as "collection" of the debt. Contrary to the Petitioners' argument, non-judicial foreclosure activity – which, again, consists of mailing, service, recording, and publication of foreclosure notices (and/or postponements) and, ultimately, conducting of the sale – does not fall squarely within these definitions.

A. First and foremost, the issue of whether mortgage indebtedness falls squarely within the Act's definition of "debt" is not a foregone conclusion.

While, on its face, mortgage indebtedness appears to satisfy the definition of "debt" articulated in Section 1692a(5), a closer examination of other provisions of the Act demonstrates that Congress did not intend to engage in a simple, "check the box" type of analysis when dealing with mortgage indebtedness. For instance, in Section 1692a(6)(F), Congress excluded from the definition of "debt collector" persons who are foreclosing (whether judicially or non-judicially) on mortgage debt that was not in default when they obtained it, whether it be for purposes of servicing the loan or its collection. *Henson*, 137 S. Ct. at 1723-24. *See also*, S. Rep. No. 95-382, at 3-4. As a result, in such situation, non-judicial foreclosure of a previously performing loan would not fall within the purview of the Act.

Moreover, in limiting Section 1692i's venue provision to judicial foreclosures only (*Obduskey*, at 1222 – recognizing that the term "action" applies to a judicial proceeding), Congress – while being well aware of the fact that more than half of the states have laws governing non-judicial foreclosures – appears to have made a conscious decision to exempt or otherwise exclude the non-judicial foreclosure process from the Act's provisions. *See, e.g., Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 259, 129 S. Ct. 788, 172 L.Ed.2d 582 (2009) [in assessing the Congress' intent the Court evaluates the state of law at the time the statute is passed]; *Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor v. Perini N. River Assocs.*, 459 U.S. 297, 319, 103 S. Ct. 634, 74 L.Ed.2d 465 (1983) [the Court "may presume 'that our elected representatives, like other citizens, know the law'"]; *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239-40, 129 S. Ct. 2484, 174 L.Ed.2d 168 (2009) ["Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."]; *Loughrin v. United States*, 573 U.S. 351, 134 S. Ct. 2384, 2390, 189 L.Ed.2d 411 (2014) ["We have often noted that when 'Congress includes particular language in one section of a statute but omits it in another'—let alone in the very next provision—this Court 'presume [s]' that Congress intended a difference in meaning."]; *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725, 198 L. Ed. 2d 177 (2017) ["[W]hile it is of course our job to apply faithfully the law Congress has written, it is never our job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress

might have done had it faced a question that, on everyone's account, it never faced... Legislation is, after all, the art of compromise, the limitations expressed in statutory terms often the price of passage, and no statute yet known 'pursues its [stated] purpose [ ] at all costs.'"] [internal citations omitted]; *Townsend v. Yeomans*, 301 U.S. 441, 451, 57 S. Ct. 842, 81 L. Ed. 1210 (1937) ["the Legislature, acting within its sphere, is presumed to know the needs of the people of the state."]

Based on this authority and given the language of the Act itself, it is therefore evident that a more detailed analysis (than the one suggested by the Petitioners) is necessary. But, even if mortgage indebtedness falls within the provisions of the definition of "debt," as discussed below, the process of non-judicially foreclosing on a delinquent mortgage loan does not constitute "collection" under the Act.

B. The Act does not apply to non-judicial foreclosure activities because they do not qualify as "debt collection."

While the Act did not define the term "debt collection," case law interpreted it to mean the "activity undertaken for the general purpose of inducing payment." *McLaughlin v. Phelan Hallinan & Schmieg, LLP*, 756 F.3d 240, 245 (3d Cir. 2014) [internal citation omitted]. There is a caveat to this definition, however. When reviewing Section 1692a(5)'s definition of "debt," it stands out that Congress has elected to limit it to an "obligation ... of a consumer to pay money." While the NCLS *amici* attempt to gloss over this limitation, the limitation is significant. Based on this limitation, it is evident that, in order for the activity to fall within the

definition of "debt collection," it must be aimed or directed at collecting money from the consumer and not from any other person as the NCLS *amici* suggests.[4] *Vien-Phuong Thi Ho v. ReconTrust Co., NA*, 858 F.3d 568, 572 (9th Cir., 2017) ("*Ho*") [also holding that "debt collection" necessarily involves collection of money from the consumer, as "debt" is "synonymous with 'money.'" *Id.* at 571]; *see also, Molina v. F.D.I.C.*, 870 F. Supp.2d 123, 133 (D.D.C. 2012), aff'd in part sub nom. *Molina v. Ocwen Loan Servicing*, 545 F.App'x 1 (D.C. Cir. 2013) [holding that the plaintiff failed to state a claim for violation of FDCPA where he failed to allege that the defendant attempted to collect money from him].

The non-judicial foreclosure activity does not fall within these provisions as it does not involve collection of money from the consumer. The Ninth Circuit, which is the first Circuit that has thus far recognized the fact that the "debt collection" activity is limited to activity designed to induce payment from the consumer and not from some other person

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[4] The NCLS *amici* rely on provisions of Section 1692a(2) and 1692d in their attempt to avoid the consequences of the limitations Congress imposed on the definition of "debt." However, neither of these provisions is relevant to the issues at hand, as they neither address the issue nor aid in making the determination of whether non-judicial foreclosure constitutes "debt collection." Specifically, Section 1692a(2) merely sets forth the definition of "communication," whereas Section 1692d articulates prohibitions on conduct that is harassing, oppressing, or abusing to "any person" in connection with debt collection activity. Neither of these provisions is in any way related to the determination of what activity constitutes "debt collection" or aides in making the determination whether the definition includes non-judicial foreclosure.

(and construed this limitation in the context of a non-judicial foreclosure), explained that, while different courts have come to different conclusions regarding the purpose of a non-judicial foreclosure sale,[5] the undeniable effect of a non-judicial foreclosure sale is collection of money by the trustee from the purchaser of the property and not from the delinquent consumer/borrower. *Ho*, at 572.

In *Hulse v. Ocwen Fed. Bank, FSB*, 195 F. Supp. 2d 1188, 1204 (D. Or. 2002), the United States District Court of Oregon, elaborated that foreclosing on a trust deed is distinct from the collection of the obligation to pay money, as payment of funds is not the object of the foreclosure action. Rather, the lender is foreclosing its interest in the property. *Hulse*, at 1204. Consequently, the non-judicial foreclosure sale cannot equate to collection of debt – *i.e.*, money – from the consumer, as, the "FDCPA was intended to curtail objectionable acts occurring in the process of collecting funds from a debtor. But foreclosing on a trust deed is an entirely different path. *Id.* Payment of funds is not the object of the foreclosure action. *Id.* Rather, the lender is foreclosing its interest in the property." *Id.*

Additionally, under 15 U.S.C. § 1692a(6), "the statute's definition of a 'debt collector' clearly reflects Congress's intent to distinguish between the

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[5] *See, Ho*, at 572 [citing to *Burnett* v. *Mortg. Elec. Registration Sys., Inc.*, 706 F.3d 1231, 1239 (10th Cir. 2013) and *Alaska Tr., LLC* v. *Ambridge*, 372 P.3d 207, 228 (Alaska 2016) (Winfree, J., dissenting) for the proposition that non-judicial foreclosure does not involve collection of money but merely sale or real estate and *Glazer* v. *Chase Home Fin. LLC*, 704 F.3d 453, 463 (6th Cir. 2013) for the proposition that "the ultimate purpose of foreclosure is the payment of money".]

'collection of any debts' and the 'enforcement of security interests.'" *Gray v. Four Oak Court Ass'n, Inc.*, 580 F. Supp. 2d 883, 887–88 (D. Minn. 2008). As the first sentence of the definition under 15 U.S.C. § 1692a(6), defines a debt collector as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." *Id.* § 1692a(6)." *Id.* While, the third sentence of Section 1692a(6) provides that for purposes of Section 1692f(6), a debt collector is also "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests." *Id.*

If the enforcement of a security interest was synonymous with debt collection, the third sentence would be surplusage because any business with a principal purpose of enforcing security interests would also have the principal purpose of collecting debts. *Id.* "Therefore, to avoid this result, the court determines that the enforcement of a security interest, including a lien foreclosure, does not constitute the 'collection of any debt.'" *Id.* Accordingly, the non-judicial foreclosure process and the resulting sale does not and cannot equate to collection of debt – *i.e.*, money – from the consumer and, therefore, does not amount to "debt collection" under the Act.

In *Obduskey*, the Tenth Circuit agreed with the Ninth Circuit's reasoning, explaining that, unlike judicial foreclosure, which permits recovery of deficiency judgments from the defaulted borrowers,

non-judicial foreclosure activity does not provide for recovery of such deficiency. *Obduskey*, at 1221-22 ["non-judicial foreclosure proceeding ... only allows 'the trustee to obtain proceeds from the sale of the foreclosed property, and no more.'"]; *see also*, *Ho*, at 571 [under California law, non-judicial foreclosure sale extinguishes the entire debt and the borrower is not subjected to a deficiency judgment].

In *Bourff v. Rubin Lublin, LLC*, No. 1:09-CV-2437-JEC-ECS, 2010 WL 11507208, at *5 (N.D. Ga. Aug. 6, 2010), report and recommendation adopted in part sub nom. *Bourff v. Rubin Lublin, LLC*, No. 1:09-CV-2437-JEC, 2010 WL 11507894 (N.D. Ga. Sept. 22, 2010), vacated and remanded, 674 F.3d 1238 (11th Cir. 2012), the Northern District Court of Georgia held, "the fact that Georgia is a non-judicial foreclosure state further bolsters Defendant's argument that it should not come under the ambit of the FDCPA." citing to *Rousseau v. Bank of New York*, No. 08-CV-00205-PAB-BNB, 2009 WL 3162153, at *7–8 (D. Colo. Sept. 29, 2009) (explaining that courts "have noted the difference between cases involving non-judicial foreclosures, in which FDCPA claims are often disallowed, and cases involving judicial foreclosures, in which claims are permitted"). In conclusion, because the non-judicial foreclosure process is designed solely to sell the collateral which serves as security for the underlying mortgage loan and does not involve actual collection of money from the consumer, it does not and cannot qualify as "debt collection" under the Act. *Id.*

The Petitioners offer no compelling argument to refute this reasoning. They merely rely on the Court's citation to Black's Law Dictionary in *Heintz v. Jenkins*: "[t]o collect a debt or claim is to obtain

payment or liquidation of it, either by personal solicitation or legal proceedings," claiming that foreclosure amounts to "liquidation." *Heintz v. Jenkins*, 514 U.S. 291, 294, 115 S. Ct. 1489, 131 L. Ed. 2d 395 (1995) [citing to Black's Law Dictionary 263 (6th ed. 1990)]. This reliance is misplaced, as this definition does not apply to non-judicial foreclosures. Specifically, the 6th edition of Black's Law Dictionary defines the term "liquidate" as "[t]o pay or settle" and the term "liquidation" as "[t]he act or process of settling or making clear, fixed, and determine that which before was uncertain or unascertained. Payment, satisfaction, or collection... [t]o clear away (to lessen) a debt." [Black's Law Dictionary, p.p. 930, 931 (6th ed. 1990).] Thus, the Dictionary – and necessarily *Heinz* – refer to liquidation of the debt – through payment or settlement thereof – and not to the liquidation of *collateral* securing the underlying debt. And given that the non-judicial foreclosure sale results in the sale (and not liquidation) of the collateral, it is evident that the non-judicial foreclosure sale does not equate to liquidation specified in *Heinz*.

Legal League recognizes that both, the Ninth and the Tenth Circuit (*Ho*, at 573; *Obduskey*, at 1222) limit their holdings to activities related to non-judicial foreclosure on real property – *i.e.*, mailing, service, recording, and publication of foreclosure notices, and postponements and conducting of the sale – recognizing that activities outside of this process (or activities that are traditionally recognized as debt collection) fall within the purview of the Act. Legal League does not dispute that activities which consist of "traditional debt collection activities [such as] ... sending dunning letters,

making collection calls to consumers..." [Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act, 53 FR 50097-02], as opposed to non-judicial foreclosure activities described in this Brief fall within the provisions of the Act.

C. The provisions of Section 1692f(6) do not in any way alter the conclusion reached in *Ho* and *Obduskey*.

While the Circuits disagree as to whether the non-judicial foreclosure process and the entities involved in it are subject to the provisions of Section 1692(f)(6),[6] that divergence does not affect the determination of the underlying issue of whether non-judicial foreclosure activities amount to "debt collection." Even if the provisions of Section 1692f(6) were applicable to the non-judicial foreclosure process, they would only impose limits on the activities prohibited thereunder, *i.e.*, commencing or threatening the non-judicial foreclosure "to effect dispossession... of property if - (A) there is nopresent right to possession of the property claimed as collateral through an enforceable security interest; (B) there is no present intention to take possession of the property; or (C) the property is exempt by law from such dispossession or disablement." *Ho*, at 573; 15 U.S.C. § 1692f(6). They have no impact on the general classification of the non-judicial foreclosure activity as "debt collection".

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[6] *See, e.g., Obduskey*, at 1221, fn. 4 [holding that non-judicial foreclosure actions do not fall within the provisions of Section 1692f(6)]; and *Ho*, at 572-73 [finding that a foreclosure trustee falls under the definition of "debt collector" under the provisions of Section 1692f(6).]

IV. The Policy Behind the Act Also Suggests that Non-Judicial Foreclosure Activity Does Not Amount to "Debt Collection.

The Act was enacted because Congress found that State laws were inadequate to protect consumers from abusive debt collection practices by third party collection agencies and that such practices were "a widespread and serious national problem." *See*, 15 U.S.C. § 1692; Senate Report No. 95-382, p. 2. However, these considerations do not apply to the non-judicial foreclosure notices issued pursuant to the mandates of State law. Not only are these notices merely informational in nature, they do not demand payment from the consumer borrowers, and are not the type of harassing or abusive communication the FDCPA was designed to protect against. Indeed, they "were designed to *protect* the debtor." *Ho*, at 574 [emphasis in original].[7]

While the issuance of non-judicial foreclosure notices may, of course, induce the defaulted consumer borrower to either cure the deficiency or even pay off the loan completely, that possibility, in and of itself, does not transform a regular non-judicial foreclosure process into "debt collection": "[t]he prospect of having property repossessed may, of course, be an inducement to pay off a debt. But that inducement exists by virtue of the lien, regardless of whether foreclosure proceedings

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[7] *See also, e.g., Yvanova v. New Century Mortg. Corp., supra,*, 62 Cal.4th at 926-27; *U.S. Bank Nat. Ass'n v. Castro, supra,*, 131 Haw. at 39 *Bain v. Metro. Mortg. Grp., Inc., supra* 175 Wn.2d at 93-94*Brandrup v. ReconTrust Co., supra*, 353 Or. at 677-78; *Patton v. First Fed. Sav. & Loan Ass'n of Phoenix, supra*, 118 Az. at 477.

actually commence. The fear of having your car impounded may induce you to pay off a stack of accumulated parking tickets, but that doesn't make the guy with the tow truck a debt collector." *Ho*, at 572.

V. Industry Impact and Public Policy

A. Legislative History and Original Intent of FDCPA

The roots of the Fair Debt Collection Practices Act ("FDCPA") trace to the enactment of the Consumer Credit Protection Act ("CCPA") in May 1968 which was an effort by Congress to "safeguard consumers in connection with the utilization of credit by requiring full disclosure of the terms and conditions of finance charges in credit transactions",[8] among other activities. The original CCPA covered several major areas of consumer credit, relating to both origination and collection activity, and was the framework for the Truth in Lending Act, Equal Opportunity Act and the Fair Credit Reporting Act, among others. The stated purpose of the CCPA was to "assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices", believing that "economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of

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[8] Pub.L. 90-321 82 Stat. 146 Codified as amended to 15 U.S.C. 1601 §§1692 *et.seq.*

consumer credit would be strengthened by the informed use of credit."[9]

In 1977, the CCPA was amended to add Title VIII, the Fair Debt Collection Practices Act as a response to the "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors."[10] The FDCPA was crafted to prohibit debt collectors from threatening or harassing debtors and generally defined a "debt collector" as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly, or indirectly, debts owed or due another."[11] The FDCPA principally applies to third party collectors, and not a creditor attempting to collect his own debt unless the creditor uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts.[12] Those debts covered by the FDCPA are limited to "obligations of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment"[13] and do not include debts that

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[9] Section 1 of title I of the Act of May 29, 1968 (Pub. L. No. 90--321; 82 Stat. 146), effective May 29, 1968; Codified as amended to 15 U.S.C. 1601 §102(a)

[10] 15 USC §1692 (a)

[11] *Id.* §1692a (6)

[12] *Id.*

[13] *Id.* §1692a (5)

were not in default at the time it was obtained by the creditor.[14] Violations of the FDCPA give rise to a private cause of action for the consumer and could lead to an award of $1,000 per violation in addition to actual damages.[15] Today, rulemaking, reporting, and enforcement of debt collection activities governed by the FDCPA are shared by the Consumer Financial Protection Bureau and the Federal Trade Commission.[16]

The FDCPA was intended to serve three purposes: (i) eliminate abusive debt collection practices by debt collectors; (ii) insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged; and (iii) promote consistent State action to protect consumers against debt collection abuses.[17]

1. To eliminate abusive debt collection practices by debt collectors.

Prior to the enactment of the FDCPA, debt collection activity was wholly unregulated. Debt collectors were able to use harassing, embarrassing, and other extreme collection activity with little to no accountability. The purpose of the FDCPA was to provide parameters for collection activity and to expressly prohibit conduct intended to harass, oppress, or abuse any person in connection with the collection of a debt.[18]

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[14] *Id.*§1692a (6)(f)

[15] *Id.*§1692k (a)

[16] P.L. 111-203, 124 Stat. 1376 (2010).

[17] 15 USC §1692 (e).

[18] *Id.* §1692d.

The FDCPA details prohibited activities such as false, deceptive, or misleading representations[19]; unfair or unconscionable means;[20] communications at unusual times or places;[21] or at the consumer's place of employment.[22] The FDCPA does not prevent a creditor or a debt collector from attempting to collect a debt nor does it prohibit a creditor from using reasonable non-legal and legal means to collect a debt. The purpose of the FDCPA was not to limit collection activity, but rather to eliminate abusive collection practices.

2. Insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged.

Congress was clear the FDCPA's sole purpose wasn't just to protect consumers, but to also protect debt collectors who were using non-abusive collection efforts. The enactment of the FDCPA has given rise to thousands of consumer claims against debt collectors, both in judicial and regulatory settings. Violations of the FDCPA have become a common cause of action in the creditor's rights arena, giving rise to frivolous lawsuits seeking damages for technical violations, causing backlogs in the courts and delays in collecting valid debts. As a result, the overall cost of collecting a debt increases, ultimately absorbed by the debtor. The FDCPA was never intended to impede a debt collector from collecting a valid debt using non-abusive collection efforts. Rather, the purpose was to level the playing field by

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[19] *Id.* §1692e

[20] *Id.* §1692f

[21] *Id.* §1692c (a)(1)

[22] *Id.* §1692c (a)(3)

penalizing those debt collectors that did not comply with the FDCPA.

3. To promote consistent State action to protect consumers against debt collection abuses.

The FDCPA was never intended to preempt state debt collection laws nor private contracts where they are not inconsistent.[23] Unfortunately, due to the broad and inconsistent application of the FDCPA, debt collectors routinely find themselves in situations where they are unable to comply with state statute or contractual obligations without risking violating the FDCPA. The liberal and often inappropriate application and interpretation of the FDCPA in the courts across the country has only increased the inconsistency of State action to protect consumers.

a. Public Policy and the Effect of Detrimental Ruling

In addition to the position that the FDCPA does not apply to non-judicial foreclosures based on a plain reading of the language of the statute, public policy considerations require a ruling in favor of the FDCPA not applying to non-judicial foreclosures due to the conflicts between the FDCPA and state foreclosure laws. The application of the FDCPA to non-judicial foreclosures would not only conflict with Colorado law governing non-judicial foreclosures, but most other non-judicial foreclosure states as well.

Real estate transactions, property rights, and foreclosures of real property have traditionally been governed by state law. *BFP v. Resolution Tr. Corp.*, 511 U.S. 531 (1994). Most non-judicial states have a

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[23] *Id.* §1692n

statutory scheme governing their foreclosure process which balances the rights of lenders to obtain title to the secured real estate and borrower's and interested parties' rights to be properly notified of the foreclosure in a manner that allows the borrower or third parties to protect their interest in the property. Every state's non-judicial process is unique from states such as Texas[24] and Georgia[25] which require all sales to occur on the first Tuesday of the month, to public trustee states such as Colorado[26] which involve a public trustee and limited court process. When considering conflicts between areas of the law traditionally regulated by the state and federal law, the court must assume that congress did not plan to override or exercise preemption over state law unless specifically stated in the statute. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005);*BFP v. Resolution Tr. Corp.*, 511 U.S. 531, 544 (1994). Congress did not manifest a specific intention to override state foreclosure law when drafting the FDCPA and does not reference non-judicial foreclosures in the statute.

Under Colorado Law, a notice of foreclosure must be provided to any party with an interest in the property including but not limited to junior lienholders and other owners who are not obligated on the debt.[27] The notices required to be provided not only contains notice that the property is in foreclosure, but also contains account information which would not otherwise be provided to third

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[24] Tex. Prop. Code § 51.002

[25] O.C.G.A. § 9-13-161(a)

[26] C.R.C.P. 120(a)

[27] C.R.C.P. 120(a)

parties without specific authorization from the borrower in accordance with the FDCPA.[28] IF the FDCPA were to apply to non-judicial foreclosure, strict compliance with the Colorado foreclosure laws by a foreclosing party violates the FDCPA.

These public policy concerns are not isolated to Colorado. Petitioner claims that concerns over a conflict with a few Colorado statutes should not result in the FDCPA being ruled inapplicable to the foreclosures in all 50 states, however concerns over conflicts with state law are applicable to all non-judicial states. Like Colorado most non-judicial states require a notice of the foreclosure sale be sent directly to parties with an interest in the property not just the obligor on the underlying loan. These other parties can include junior lienholders and or other individuals with an ownership interest in the property.[29] All non-judicial states require the notice of foreclosure sale to be publicly posted or advertised in one or more of the following manners: posting the notice at the property, posting the notice at the courthouse, or publishing the notice in the newspaper.[30] These notices would technically violate the FDCPA requirements prohibiting the release of information if the FDCPA were to be applied to non-judicial foreclosures.

The public notice requirement in non-judicial states serve three important purposes which benefit

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[28] C.R.C.P. 120(a)

[29] *See Generally* California Civil Code §2924, 2924(f); O.C.G. A. §9-13-142

[30] *See Generally* California Civil Code §2924, 2924(f); O.C.G. A. §9-13-142; Tex. Prop. Code §51.002.

the borrower and general public. First, the public notice requirements serve to provide a borrower additional notice their property is scheduled to be foreclosed. Even though all non-judicial states require some form of notice be provided directly to a borrower via mail, the public notice requirements ensure a borrower has another way to become aware of the foreclosure should the borrower not receive the mailed notices. Second, notices to third parties with an interest in the property allows for those third parties to protect their interest. It would be unjust for a junior lienholder to be extinguished in a foreclosure by a senior lien holder without notice over concerns that releasing information to them would violate a borrower's rights. Third, providing public notice of the foreclosure sale encourages third parties to attend and bid at the foreclosure sale. By including the total debt amount it allows third parties to make a proper analysis of whether it is economically feasible to purchase the property at the foreclosure sale. It is not only in the lender's best interest that the greatest value be achieved at the foreclosure sale. It also benefits the borrower. Funds that are obtained at the foreclosure sale reduce any potential deficiency balance remaining on the borrower's loans. Also, if the property is sold for more than total debt, those excess funds are generally distributed directly the borrower. The best way to attract purchasers at a foreclosure sale and increase the sales price at auction is through an open and transparent process. Prohibiting the notice of a foreclosure sale to the general public would no longer make foreclosures a public auction. It makes it more difficult for borrowers and other parties to

become aware the property is in foreclosure, and would stifle or chill bidding by third parties.

The argument that it is a remote possibility that a borrower would bring suits against law firms or trustees for violating the FDCPA over strict compliance with the FDCPA is unfounded.[31] Unfortunately, this exact issue is currently being litigated in Michigan. Michigan Law requires a notice of sale include the amount due on the note. MCL 600.3208. Borrowers have filed suit alleging Michigan Law violates the FDCPA prohibitions against releasing account information to unauthorized third parties. Courts in Michigan have specifically ruled that the release of financial information in a notice of sale required under Michigan Law is a violation of the FDCPA. *Thompke v. Fabrizo & Brook, P.C.*, 261 F. Supp. 3d 798, 811 (E.D. Mich. 2017); *Thebert v. Potestivo & Assoc.*, Case No. 16-CV-14341, 2017 WL 3581322. These rulings and strict interpretation of the FDPCA have now cast doubt on the ability of law firms and lenders to conduct non-judicial foreclosure in that state without violating the FDCPA and may force Michigan foreclosures to begin being conducted judicially contrary to the desire of the state that foreclosures be conducted non-judicially.

Releasing information required under state foreclosure laws is not protected under the court order exception of the FDCPA. In a non-judicial foreclosure there is no court involvement and hence no court order authorizing the release of such information. The court order exception is intended to allow a judge on an individual case by case basis to

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[31] *See Petitioners Brief at 27.*

release information where necessary for the efficacy of justice. It was not intended to allow states to pass blanket laws contradictory to the FDCPA. If the court were to interpret the court exception to apply in this case, then states would be able to simply override the entire FDCPA including those sections where, unlike in the case of non-judicial foreclosure, Congress specifically intended for Federal preemption to apply by passing statutes overriding any provision of the FDCPA.

Petitioner claims that even though foreclosure is a traditional state interest Congress has regulated foreclosures in several areas such as TILA, RESPA and the Bankruptcy Code.[32] This is correct, but in each instance, Congress specifically stated its desire to pre-empt state foreclosure law in those areas. For example, in the Bankruptcy Code, Congress specifically states that the Automatic stay applies to "any act to create, perfect, or enforce any lien against property of the estate."[33] The FDCPA does not pre-empt state foreclosure law because Congress does not have the authority to do so. Instead, the FDCPA does not preempt state foreclosure law because Congress did not specifically manifest its intent to do so.

If the court were to hold that an attorney or trustee conducting a non-judicial foreclosure sale is subject to FDCPA liability, it would open the floodgates across the country for copycat suits similar to the pending litigation in Michigan alleging violations of the FDCPA in states where foreclosure laws are in conflict with the FDCPA. This would

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[32] See Petitioner Brief at 26-27.

[33] 11 U.S.C. 362 § (a)(4)

force lenders and their attorneys to consider proceeding with judicial foreclosures in these states which would significantly increase the time and costs associated with a foreclosure. These costs would likely not be borne by the lenders but instead would be added to any debt of the borrower per the terms of most deeds of trust and state law. It would also force states which have carefully crafted foreclosure laws designed to best protect borrowers and lenders to re-write their carefully crafted foreclosure laws in order to comply with the FDCPA.

CONCLUSION

For these reasons set forth above, the ruling of the Tenth Circuit should be affirmed.

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Dated: November 2018.

No. 17-1307

IN THE

Supreme Court of the United States

DENNIS OBDUSKEY,

Petitioner,

v.

MCCARTHY & HOLTHUS LLP, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are members of Congress who serve on the committees with jurisdiction over the federal financial regulatory agencies and the banking industry. By virtue of that service, *amici* are familiar with the Fair Debt Collection Practices Act (FDCPA), the reasons why Congress adopted this broad prohibition on unfair debt collection practices, and the important role that the Act currently plays in protecting consumers, including those with home mortgages, from abusive practices by debt collectors. *Amici* are thus particularly well situated to provide this Court with insight into the scope of the FDCPA, and also have a strong interest in the Act being enforced in a manner consistent with its text, structure, and purpose. A full listing of *amici* appears in the Appendix.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1975, in response to "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors," which contribute to "personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy," 15 U.S.C. § 1692(a), Congress passed the Fair Debt Collection Practices Act (FDCPA). In doing so, Congress sought to "eliminate abusive debt collection practices by debt collectors, [and] to insure that those debt

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." *Id.* § 1692(e). To achieve those ends, the FDCPA prohibits debt collectors from engaging in deceptive, misleading, harassing, or abusive practices when attempting to collect debts. The question in this case is whether non-judicial foreclosure—the process by which a trustee or other entity conducting a foreclosure [hereinafter "trustee"] takes and sells a consumer's home to fulfill an unpaid home mortgage—constitutes debt collection within the meaning of the statute. The text of the Act, and Congress's plan in enacting it, both make clear that debt collectors engaging in non-judicial foreclosure, like other debt collectors, must comply with the requirements of the FDCPA.

To start, under the plain text of the statute, non-judicial foreclosure qualifies as debt collection. A home mortgage is a debt, and non-judicial foreclosure is a means of obtaining payment of that debt. Indeed, trustees engaging in non-judicial foreclosure plainly meet the definition of "debt collector": "any person . . . who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6). Trustees use non-judicial foreclosure to collect, either directly or indirectly, the debt owed on a home. They may collect the debt directly by inducing a consumer to make overdue mortgage payments in order to avoid losing his or her home. Or they may collect the debt indirectly by following through with the foreclosure, selling the home, and using the proceeds to pay at least a portion of the debt. To be sure, a foreclosing trustee is also securing an interest in property, but that does not change the fact that the goal of foreclosure is payment of the debt.

Holding that non-judicial foreclosure is debt collection also accords with Congress's plan in enacting the FDCPA. Congress passed the FDCPA to protect consumers from abusive debt collection practices—specifically, to prevent debt collectors from engaging in deceptive, misleading, and harassing tactics in their communications with consumers. Holding that communications relating to non-judicial foreclosure are not covered by the FDCPA would undermine Congress's primary aim in passing the law. Indeed, affording protections to consumers in the foreclosure process is particularly important given the personal, familial, and financial importance individuals attach to their homes, and the added leverage these factors provide debt collectors in the foreclosure process.

Finally, although some lower courts have expressed concern that treating non-judicial foreclosure as debt collection would undermine state laws related to foreclosure, there is no basis for this concern. With respect to the potential conflicts to which lower courts have pointed, the relevant state laws can be reasonably read not to conflict with the FDCPA. Moreover, in the numerous jurisdictions in which federal and state courts have held that non-judicial foreclosure *is* debt collection, there have been no reports of difficulties enforcing both state laws and the FDCPA. Finally, even if there were an irreconcilable conflict between state laws and the FDCPA, the FDCPA explicitly preempts conflicting state laws, while also providing a mechanism for the federal government to exempt debt collectors from certain FDCPA requirements where state protections are deemed adequate. Thus, any purported conflict with state laws is no justification for construing the scope of the FDCPA more narrowly than its text and purpose require.

ARGUMENT

I. THE TEXT OF THE FDCPA DEMONSTRATES THAT THE ACT APPLIES TO NON-JUDICIAL FORECLOSURES.

The text of the FDCPA demonstrates that the Act applies to non-judicial foreclosures. Though the FDCPA repeatedly "speaks in terms of debt collection," it does not define the term. *Glazer v. Chase Home Finance LLC*, 704 F.3d 453, 459 (6th Cir. 2013); *see, e.g.*, 15 U.S.C. § 1692c(a) (prohibiting "communicat[ion] with a consumer *in connection with the collection of any debt*" in certain circumstances (emphasis added)); *id.* § 1692e (prohibiting "false, deceptive, or misleading representation[s] or means *in connection with the collection of any debt*" (emphasis added)). Despite the absence of an explicit definition, however, the plain meaning of the term "debt collection," as well as the Act's various other provisions, all make clear that the term "debt collection" encompasses non-judicial foreclosure. *See Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 476 (1994) ("In the absence of . . . a definition, we construe a statutory term in accordance with its ordinary or natural meaning.").

First, a home mortgage is a "debt." The FDCPA defines a "debt" as "*any* obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes." 15 U.S.C. § 1692a(5) (emphasis added). "[T]he word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997).

A home mortgage is an obligation to "pay money arising out of a transaction in which the . . . property

. . . which [is] the subject of the transaction [is] primarily for personal . . . purposes," 15 U.S.C. § 1692a(5), and thus plainly meets this definition. A mortgage, after all, is an obligation to pay money arising out of the sale of a home. *See Mortgage*, Black's Law Dictionary (10th ed. 2014) (defining mortgage as a "lien against property that is granted to secure an obligation (such as a debt) and that is extinguished upon payment or performance according to stipulated terms"). And a home mortgage does not cease to be a "debt" simply because a trustee initiates foreclosure proceedings. *See Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373, 376 (4th Cir. 2006) (a mortgage "'debt' remain[s] a 'debt' even after foreclosure proceedings commence[]"). Rather, a mortgage remains a debt until there is "payment or performance according to the stipulated terms." *Mortgage*, Black's Law Dictionary (10th ed. 2014).

Because a home mortgage is a "debt," initiating a non-judicial foreclosure when a debtor fails to make payments on a home mortgage is plainly an attempt to "collect[]" a debt, *e.g.*, 15 U.S.C. § 1692c(a). As this Court has explained in a different context, "[i]n ordinary English, a lawyer who regularly tries to *obtain payment of consumer debts* through legal proceedings is a lawyer who regularly 'attempts' to 'collect' those consumer debts." *Heintz v. Jenkins*, 514 U.S. 291, 294 (1995) (emphasis added). Like the legal proceedings at issue in *Heintz*, non-judicial foreclosure is clearly intended to obtain payment of a debt (the mortgage), "either by persuasion (*i.e.*, forcing a settlement) or compulsion (*i.e.*, obtaining a judgment of foreclosure, selling the home at auction, and applying the proceeds from the sale to pay down the outstanding debt)." *Glazer*, 704 F.3d at 461; *see Shapiro & Meinhold v. Zartman*, 823 P.2d 120, 124 (Colo. 1992) (en banc)

("foreclosure is a method of collecting a debt by acquiring and selling secured property to satisfy a debt").

The fact that the means of collecting the debt is the selling of the home instead of demanding payment is immaterial. "[T]he payment of money is the ultimate result of foreclosure," and the "sale of the secured property"—that is, the home—is simply a way to achieve that goal. Eric M. Marshall, Note, *The Protective Scope of the Fair Debt Collection Practices Act: Providing Mortgagors the Protection They Deserve from Abusive Foreclosure Practices*, 94 Minn. L. Rev. 1269, 1297 (2010); *see Glazer*, 704 F.3d at 463 ("the ultimate purpose of foreclosure is the payment of money"). Indeed, in most states that permit non-judicial foreclosure, including Colorado, if the proceeds of a foreclosure do not cover the outstanding debt, a creditor may seek a deficiency judgment against the debtor for the remaining balance. Marshall, *supra*, at 1274; *see Franks v. Colo. Nat'l Bank-Arapahoe*, 855 P.2d 455, 457 (Colo. App. 1993) ("The Bank is entitled to a deficiency judgment to the extent that the debt exceeds the fair market value of the property."). This fact only underscores that the goal of foreclosure is not simply to acquire and sell a home; it is to collect the debt that the mortgagor owes. Moreover, "[a]ny excess funds raised [through foreclosure] over the amount owed by the borrower . . . are paid to the borrower," *Vien-Phuong Thi Ho v. ReconTrust Co., NA*, 858 F.3d 568, 578 (9th Cir. 2017) (Korman, D.J., dissenting in part and concurring in part); *see* Colo. Rev. Stat. Ann. § 38-38-111 (West 2018), only confirming that the goal of foreclosure is to collect the debt, not to retake and resell the property. *See* Pet'r Br. 12 ("The entire point of the foreclosure is to liquidate the asset and pay the underlying debt."); *Heintz*, 514 U.S. at 294 (collecting a debt means "to

obtain payment or liquidation of it" (quoting Black's Law Dictionary 263 (6th ed. 1990))).

The court below focused on the fact that "a non-judicial foreclosure proceeding . . . only allows 'the trustee to obtain proceeds from the sale of the foreclosed property, and no more.'" *Obduskey v. Wells Fargo*, 879 F.3d 1216, 1221-22 (10th Cir. 2018) (quoting *Burnett v. Mortg. Elec. Registration Sys., Inc.*, 706 F.3d 1231, 1239 (10th Cir. 2013)). But just because a creditor would need to initiate a separate proceeding to obtain a deficiency judgment for the remaining balance of the debt does not mean that the non-judicial foreclosure was not itself an attempt to collect at least a portion of the debt. And it does not take away from the fact that merely initiating a non-judicial foreclosure could—and is often intended—to spur a consumer to pay prior missed payments to keep his or her home. Colorado provides a case in point: under Colorado law, borrowers may cure a default and avoid foreclosure by paying everything they owe up until 12 p.m. on the day of a scheduled foreclosure sale. Colo. Rev. Stat. Ann. § 38-38-104(2)(b) (West 2014). Tellingly, the court below acknowledged that if a debt collector "attempted to induce Mr. Obduskey to pay money by threatening foreclosure, the FDCPA might apply," 879 F.3d at 1222; it simply failed to recognize that initiating foreclosure is itself an attempt to induce payment.[2]

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[2] The court below suggested that the FDCPA applies only to judicial foreclosures, citing the fact that judicial foreclosures in Colorado preserve to the trustee the right to collect any deficiency left in the loan amount after the home's sale, while creditors in non-judicial foreclosures must obtain any amount of debt not covered by the home's sale through a separate deficiency action. *See Obduskey*, 879 F.3d at 1221. But as noted above, a non-judicial foreclosure is, at the very least, intended to obtain *partial* payment of the underlying debt. And more broadly, it would make little sense for the Act's protections to apply to judicial

Other provisions of the FDCPA bolster an interpretation of debt collection that includes non-judicial foreclosure proceedings. For example, the FDCPA's judicial venue clause provides that "[a]ny debt collector who brings . . . an action to enforce an interest in real property securing the consumer's obligation" shall "bring such action only in a judicial district or similar legal entity in which such real property is located." 15 U.S.C. § 1692i(a) & (a)(1). This provision assumes that those "enforcing an interest in real property" are "debt collectors."

The FDCPA's definition of "debt collector" further confirms this interpretation. Debt collector is defined as, among other things, "any person . . . who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." *Id.* § 1692a(6). Trustees initiating a non-judicial foreclosure are plainly "attempt[ing] to collect," at least "indirectly," "debts owed . . . another." After all, "a foreclosure is a method of collecting a debt by acquiring and selling secured property to satisfy a debt," so "those who engage in such foreclosures are included within the definition of debt collectors if they otherwise fit the statutory definition." *Shapiro*, 823 P.2d at 124. In fact, a non-judicial foreclosure may even be an attempt to collect a debt *directly* "because the language in the notices sent to the borrower may prompt [the borrower] . . . to exercise her rights of reinstatement or redemption by paying the arrears on the promissory note at the risk of losing the roof over her head." *Ho*, 858 F.3d at 581 (Korman, D.J., dissenting in part and

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foreclosures but not to non-judicial foreclosures, given that the latter "offer[] less protection to the consumer" and are "quicker and less expensive for the creditor," Richard D. Gage, *A Remedy Foreclosed? Mortgage Foreclosure and the Fair Debt Collection Practices Act*, 81 Fordham L. Rev. 283, 301 (2012).

concurring in part); *see* Pet'r Br. 12 ("Consumers are often left to cobble together any available funds to stave off foreclosure, and the notices [of foreclosure] serve as an obvious demand for payment.").

Nor does a secondary portion of the definition of "debt collector" affect that interpretation. After broadly defining "debt collector" to include persons who "regularly collect[] . . . , directly or indirectly, debts owed or due" another, the definition goes on to state that "[f]or the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests." 15 U.S.C. § 1692a(6). Said another way, "[o]ne who satisfies the [general definition] is a debt collector for *all* sections of the Act, but one satisfying only the [secondary definition] is a 'debt collector' limited to § 1692f(6) (concerning non-judicial repossession abuses)." *Glazer*, 704 F.3d at 463.

Respondent has suggested that this secondary definition of debt collector implies that the more general definition does not cover non-judicial foreclosures, on the theory that holding otherwise "would render meaningless the FDCPA's distinction between 'the enforcement of [a] security interest[]' and 'the collection of a[] debt[].'" Opp. 12 (quoting 15 U.S.C. 1692a(6)). But this argument misunderstands the purpose of the secondary definition, which is to make § 1692f(6) applicable to those "who engage in the business of repossessing property," even where their "business does not primarily involve communicating with debtors in an effort to secure payment of debts." *Piper v. Portnoff Law Assocs., Ltd.*, 396 F.3d 227, 236 (3d Cir. 2005). For instance, the secondary definition applies to "repossession agencies and their agents, . . . whose only role in the collection process is . . . repossess[ing] or

disabl[ing] property . . . when the debtor is not present, in order to keep the peace." *Glazer*, 704 F.3d at 464; *cf. Ho*, 858 F.3d at 583 (Korman, D.J., dissenting in part and concurring in part) (noting that a tow truck driver seizing a vehicle could constitute an enforcer of a security interest, but that a debt collector could not). Thus, for example, the secondary definition might apply to mortgage field servicing companies that perform property preservation services like inspections and lock changes, but that do not actually engage in communications in connection with the debt or attempt to secure payment of the debt. *See generally Schlaf ex. rel. Plaintiffs v. Safeguard Prop., LLC*, 899 F.3d 459, 466-67 (7th Cir. 2018).

The text of the secondary definition thus does nothing to limit the scope of the Act's broader, general definition of "debt collector." Indeed, immediately following the secondary definition of debt collector, the Act lists six explicit exceptions to the definition of "debt collector," none of which includes trustees initiating non-judicial foreclosures. *See* 15 U.S.C. § 1692a(6)(A)-(F). In short, because such trustees plainly meet the broad definition of "debt collector," their actions seeking to enforce a consumer's obligation to pay a home mortgage—including non-judicial foreclosure—should be considered "debt collection" under the Act.

II. EXEMPTING NON-JUDICIAL FORECLOSURES FROM THE FDCPA'S REQUIREMENTS WOULD CONTRAVENE CONGRESS'S PLAN IN PASSING THE ACT.

Exempting non-judicial foreclosure from the Act's requirements would not only be at odds with its text, it would also "create an enormous loophole in the Act," "immunizing any debt from coverage if that debt happened to be secured by a real property interest and foreclosure proceedings were used to collect the debt,"

Wilson, 443 F.3d at 376. This outcome contravenes Congress's plan in passing the FDCPA.

Congress passed the FDCPA in response to "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors," which contribute to "personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." 15 U.S.C. § 1692(a); S. Rep. No. 95-382, at 1696 (1977) ("abuse by third party debt collectors is a widespread and serious national problem"). Moreover, Congress found that "[e]xisting laws and procedures for redressing these injuries [we]re inadequate to protect consumers." 15 U.S.C. § 1692(b); S. Rep. No. 95-382, at 1696 (1977) ("The primary reason why debt collection abuse is so widespread is the lack of meaningful legislation on the State level."). Thus, Congress passed the Act in order to "eliminate abusive debt collection practices by debt collectors, [and] to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." 15 U.S.C. § 1692(e).[3]

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[3] Significantly, abusive practices related to foreclosure proceedings were among the offenses to which members of Congress pointed in explaining the need for this legislation. In first introducing the legislation in 1975, Representative Frank Annunzio described as inspiration a consumer's account of a letter he received threatening "the sale of [his] house," when in fact the debt collector had the wrong "lot number." 121 Cong. Rec. E5404 (daily ed. Oct. 9, 1975). Similarly, when reintroducing the bill in 1976, Representative Annunzio explained that the bill would prevent "[s]uch tactics as threatening to impound or sell a person's property." 122 Cong. Rec. H1193 (daily ed. Feb. 19, 1976). Likewise, later that year, he explained that the bill would prohibit "[p]ractices such as advertising a consumer's home for sale to scare them into paying." 122 Cong. Rec. H7177 (daily ed. July 1, 1976).

To achieve those ends, Congress designed the law to apply, subject only to limited exceptions, to "all third persons who regularly collect debt for others." S. Rep. No. 95-382, at 1697 (1977); *see supra*, Part I.[4] It prohibited these debt collectors from engaging in communications at unusual times and places, 15 U.S.C. § 1692c(a)(1), and providing false, deceptive, or misleading representations, *id.* § 1692e, and it required them to include certain basic information like the amount of the debt and the name of the original and current creditor in any notice, *id.* § 1692g(a)(1)-(2), (5).

Exempting non-judicial foreclosures from the Act would thus undermine Congress's goals in passing this legislation because abusive practices are no less a danger in the context of non-judicial foreclosure than in other debt collection contexts. In most states, a trustee initiates a non-judicial foreclosure by "provid[ing] notice of foreclosure to the debtor and publiciz[ing] the foreclosure sale." Marshall, *supra*, at 1274. Just like other notices covered by the FDCPA, notices pertaining to non-judicial foreclosure could run afoul of the Act's prohibitions, and there is nothing in the text, structure, or purpose of the FDCPA which suggests that Congress intended for those notices to be exempt from the Act's protections. Similarly, no less than other debt collection activities covered by the FDCPA, subsequent communications in the context of non-

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[4] Significantly, the principal Senate report clarified that the definition of "debt collector" does not cover "the collection of debts, such as mortgages and student loans, *by persons who originated such loans*." S. Rep. No. 95-382, at 1648 (1977) (emphasis added). Likewise, the report clarified that the definition does not cover "mortgage service companies and others who service outstanding debts for others, *so long as the debts were not in default when taken for servicing*." *Id.* (emphasis added). There would have been no reason to include those limitations if the FDCPA did not cover mortgage collection at all.

judicial foreclosure could run afoul of the Act's prohibitions, and again nothing in the text, structure, or purpose of the FDCPA suggests that Congress intended for non-judicial foreclosure to be exempt from the Act's protections.

In fact, studies have found that deceptive practices in foreclosures are extremely common. *See* John W. Schoen, *Homeowners Battle Banks To Stop Foreclosures . . . and Win*, NBC News (Nov. 2, 2015, 3:30 PM ET), https://www.nbcnews.com/business/economy/homeowners-battle-banks-stop-foreclosures-win-flna403572. According to a National Consumer Law Center study, for example, "in more than 80 percent of the cases, the lender scheduled a foreclosure sale while processing a loan modification. In four out of five cases . . . lenders failed to properly credit payments or wrongly claimed homeowners owed bogus fees." *Id.* Thus, exempting non-judicial foreclosure from the Act's protections would do exactly what Congress adopted the law to prevent, leaving "consumers vulnerable to harmful collection tactics as they fight to save their homes from foreclosure." Consumer Financial Protection Bureau, *Fair Debt Collection Practices Act: CFPB Annual Report 2013*, at 27 (Mar. 20, 2013), https://files.consumerfinance.gov/f/201303_cfpb_March_FDCPA_Report1.pdf.

Furthermore, applying the FDCPA's requirements to trustees engaging in non-judicial foreclosure would "insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." 15 U.S.C. § 1692(e). After all, the FDCPA does not prevent debt collection; it simply requires debt collectors to refrain from engaging in false, deceptive, harassing, and abusive conduct in doing so. Indeed, even if a consumer notifies a debt collector that the consumer refuses to pay and wishes the

debt collector to cease further communication pursuant to 15 U.S.C. § 1692c(c), the debt collector can still "notify the consumer that the debt collector or creditor intends to invoke a specified remedy," *id.* § 1692c(c)(3), like non-judicial foreclosure. Thus, applying the Act's requirements to non-judicial foreclosure would ensure that all trustees who initiate foreclosure are held to the same standard, and that those who abide by the Act's requirements are not competitively disadvantaged.

In fact, preventing false, misleading, and harassing debt collection practices is even more necessary to furthering the Act's goals in the context of non-judicial foreclosure than it is in other contexts. Consumers are often "rooted in the house where they are raising their children, the neighborhood where they have found a sense of belonging, or a home they built," and "[t]hese familial or emotional attachments to a home can be of overwhelming importance to borrowers." Prentiss Cox, *Foreclosure Reform Amid Mortgage Lending Turmoil: A Public Purpose Approach*, 45 Hous. L. Rev. 683, 711 (2008); *see* Marshall, *supra*, at 1286 ("Homeownership is often central to an individual's social identity," and the loss of a home can have "damaging effects."); Pet'r Br. 23 ("A family's home is typically its most important asset. It is where children are raised, and communities are formed."). Debtors can therefore be particularly susceptible to abusive collection practices when their home is at risk of foreclosure. Marshall, *supra*, at 1287. At the same time, "[i]nvestors and commercial borrowers . . . typically [do] not . . . have such attachments, but rather . . . treat their decisions in foreclosure solely as a matter of financial interest." Cox, *supra*, at 711. This mismatch of incentives could lead to more predatory behavior during foreclosures than during other types of debt collection.

Some courts have suggested the drafters of the FDCPA did not intend for the Act to apply to actions liquidating property because, in their view, secured debt is different than other types of debt in which debtors have no ability to pay due to "misfortune." *See Montgomery v. Huntington Bank*, 346 F.3d 693, 700 (6th Cir. 2003); *Jordan v. Kent Recovery Servs., Inc.*, 731 F. Supp. 652, 658 (D. Del. 1990) ("[a]ny failure to return the property to the rightful owner occurs not through misfortune but through a deliberate decision by the present possessor to avoid returning the property"). These courts fail to appreciate the misfortunes that can cause individuals to default on secured debts, especially home mortgages. Just like debtors defaulting on unsecured debts, home mortgagors often become unable to pay their mortgages due to uncontrollable circumstances like "job loss and reduced income, . . . divorce, . . . illness," and other financial problems. Cox, *supra*, at 708. Moreover, it is not always simple to return a home to a creditor once a borrower has created a life and raised a family in that home. *See supra* at 14. Borrowers in foreclosure are also "more likely to have gotten an unfair or predatory loan." Cox, *supra*, at 709. Thus, Congress's plan in passing the FDCPA—to protect consumers who cannot pay their debts due to "unforeseen event[s] such as unemployment, overextension, serious illness, or marital difficulties or divorce," S. Rep. No. 95-382, at 1697 (1977)—applies just as strongly in the context of secured debts like home mortgages as it does in the context of other debts.[5]

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[5] Moreover, characterizing a borrower's challenge to a foreclosure as "a deliberate decision by the present possessor to avoid returning the property," *Jordan*, 731 F. Supp. at 658, ignores the possibility that a foreclosure may be unnecessary or improper, or that a borrower might ultimately be able to pay back the unpaid debt in order to retain the disputed property. Indeed, in 2017,

Finally, the large number of foreclosures that occurred during the subprime mortgage crisis of 2007 and 2008 underscores the importance of the FDCPA's protections in the foreclosure context. In 2008, one in every fifty-four households received a notice of foreclosure, Les Christie, *Foreclosures up a Record 81% in 2008*, CNNMoney (Jan. 15, 2009, 3:48 AM ET), https://money.cnn.com/2009/01/15/real_estate/millions_in_foreclosure/, and in 2009, a record number of homes entered foreclosure, Les Christie, *Record 3 Million Households Hit with Foreclosure in 2009*, CNNMoney (Jan. 14, 2010, 6:07 AM ET), https://money.cnn.com/2010/01/14/real_estate/record_foreclosure_year/. Since the 2007-2008 financial crisis, foreclosure rates have remained high. In the last year alone, foreclosure starts increased in 44 percent of U.S. markets. *See Study: Foreclosure Rising in 44% of Metros*, Realtor Magazine (Aug. 21, 2018), https://magazine.realtor/daily-news/2018/08/21/study-foreclosures-rising-in-44-of-metros.[6] It runs contrary

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71% of foreclosures in Colorado were withdrawn before sale, whether due to loan modifications, cured defaults, or other reasons. *See 2017 Statewide Pub. Tr. Statistics*, Colorado County Treasurers & Public Trustees (Feb. 16, 2018, 15:00), https://tinyurl.com/2017-colo-stats.

[6] Moreover, as the 2008 financial crisis demonstrated, foreclosure can have ripple effects throughout the economy, affecting consumers far beyond the particular debtor facing the loss of his or her home. *See* G. Thomas Kingsley, Robin Smith, & David Price, *The Impacts of Foreclosure on Families and Communities*, The Urban Institute (May 2009), https://www.urban.org/sites/default/files/publication/30426/411909-The-Impacts-of-Foreclosures-on-Families-and-Communities.pdf (foreclosures can lead to declining property values, crime, social disorder, population turnover, and local government fiscal stress). It is therefore especially important that the protections of the FDCPA be applied to non-judicial foreclosures, consistent with Congress's plan in passing the law.

to Congress's legislative plan to exempt such a large part of the debt-related market from the FDCPA's protections.

III. APPLYING THE FDCPA'S REQUIREMENTS TO NON-JUDICIAL FORECLOSURES WOULD NOT UNDERMINE STATE FORECLOSURE PROTECTIONS.

1. Lastly, some courts have suggested that treating non-judicial foreclosure as debt collection would create conflicts between the FDCPA and state mortgage foreclosure laws. This is wrong, and it would not, in any event, provide a basis for interpreting the FDCPA in a manner inconsistent with the statute's text and Congress's plan in passing it.

For example, according to the court below, holding that non-judicial foreclosure is debt collection could cause the FDCPA to conflict with Colorado law. Unlike most states, Colorado requires trustees representing a foreclosing party to file a motion under Rule 120 of the Colorado Rules of Civil Procedure asking a court for an order authorizing the foreclosure sale by a public trustee even in a technically non-judicial foreclosure. Colo. R. Civ. P. 120(a). In connection with this proceeding, those who file Rule 120 motions to authorize a sale are required to list the name and address of "persons who appear to have an interest in such real property" or "persons whose interest in the real property may otherwise be affected by the foreclosure." *Id.* 120(a)(1)(B)(iv)-(v). The provision then says that "[i]n describing and giving notice to persons who appear to have acquired a record interest in real property, the address of each such person shall be the address that is given in the recorded instrument evidencing such person's interest." *Id.* 120(a)(1)(C). The court below believed that this provision was inconsistent with the FDCPA's prohibition on communications with third

parties about a consumer debt. *See* 15 U.S.C. § 1692c(b).

Even assuming Rule 120's oblique reference to "giving notice" is, in fact, a requirement that notice be given, the FDCPA expressly permits communications with many of the persons to whom any notice might be sent—the "consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector," *id.* Thus, with respect to at least some entities that might have an interest in a property, there is plainly no conflict at all. The FDCPA also specifically permits communications regarding a debt to third parties with "the express permission of a court of competent jurisdiction," *id.*, which means a foreclosing party could simply ask the Colorado district court in which the party files its Rule 120 motion for permission to contact persons with a record interest in the property.

The court below also concluded that there was a conflict between Colorado's rule requiring a foreclosing entity to mail notice to a mortgagor, Colo. R. Civ. P. 120(b), and the FDCPA's requirement that a debt collector cease all communications with a borrower when the collector knows the borrower is represented by an attorney, 15 U.S.C. § 1692c(a)(2). But there is no conflict here. First, the FDCPA provision includes a caveat that permits communications with a consumer with "the prior consent of the consumer," *id.* § 1692c(a), so creditors may simply obtain the debtor's consent in the original loan documents. This is a relatively easy task, given that mortgage loans usually involve "'take it or leave it' form[s] to the terms of which the borrower must agree if he or she wants a loan," *Ho*, 858 F.3d at 588 (Korman, D.J., dissenting in part and concurring in part). Second, Colorado courts could (and likely would) read Colo. R. Civ. P. 120(b)(4)(A)—

the requirement that notice be sent "to each person named in the motion . . . at that person's address or addresses stated in the motion"—to permit mailing that notice to a person's attorney in order to avoid any conflict with the FDCPA. Indeed, the comments to Rule 120 specifically "recommend[] that a person acting as a debt collector in a matter covered by the provisions of the Federal 'Fair Debt Collection Practices Act' be aware of the potential applicability of the Act and comply with it, notwithstanding any provision of this Rule." Colo. R. Civ. P. 120, Committee Comment to 1989 Amendment.

Citing another potential conflict, the Ninth Circuit—in its decision refusing to treat non-judicial foreclosure as debt collection—mentioned 15 U.S.C. § 1692g(b), an FDCPA provision requiring debt collectors to cease collection following a debtor's dispute until they obtain verification of the debt or the name and address of the original creditor and mail it to the consumer. *Ho*, 858 F.3d at 575 (majority opinion). The Ninth Circuit suggested that a consumer triggering this provision could cause a foreclosing party to be unable to meet the requirements of Cal. Civ. Code § 2924b(b)(1), which requires trustees to mail a copy of the notice of default within ten business days after recording it. *See Ho*, 858 F.3d at 575. But, again, there is no conflict here. A debt collector would simply need to provide a debtor with verification of the debt—a simple task that would require, at most, that the debtor be provided with proof that a debt is owed and the name and address of the original creditor, *see, e.g.*, *Clark v. Cap. Credit & Coll. Servs., Inc.*, 460 F.3d 1162, 1173-74 (9th Cir. 2006)—within that ten-business-day period. Indeed, if debt collectors understand that the FDCPA applies to foreclosures, they will likely institute processes so that they have the information they

need to verify a debt before recording a notice of default.

Moreover, practical experience for more than a decade has demonstrated that the FDCPA and state laws can easily coexist. The Third, Fourth, and Sixth Circuits, along with the Alaska and Colorado Supreme Courts, have all held that non-judicial foreclosure proceedings are debt collection and thus covered by the Act. *See Kaymark v. Bank of Am., N.A.*, 783 F.3d 168, 179 (3d Cir. 2015); *Wilson*, 443 F.3d at 376-77; *Glazer*, 704 F.3d at 461-63; *Ala. Tr., LLC v. Ambridge*, 372 P.3d 207, 213-18 (Alaska 2016); *Shapiro*, 823 P.2d at 123-24. Many states within these jurisdictions have foreclosure notice requirements similar to Colorado's, requiring notice to third parties and requiring direct communications to a borrower even if he or she is represented by an attorney. *See, e.g.*, Va. Code Ann. § 55-59.1 (West 2018) (requiring notice "by personal delivery or by mail to . . . the present owner of the property to be sold at his last known address," "subordinate lienholder[s]," "any assignee of such a note secured by a deed of trust," "any condominium unit owners' association that has filed a lien," and others); 35 Pa. Stat. Ann. § 1680.403c (West 2008) (requiring that notice be sent to a "mortgagor at his or her last known address"); N.C. Gen. Stat. Ann. §§ 45-102–45-103 (West 2012) (requiring servicers to "send written notice by mail to the last known address of the borrower" and to file information about the debt and borrower with the Administrative Office of the Courts); W. Va. Code Ann. § 38-1-4 (West 2018) (requiring publication of notice "as a Class II legal advertisement" in "the county where the property is located," and requiring notice be sent to subordinate lienholders). Despite the concerns expressed by the court below, there has been no "evidence that these holdings [of the Third, Fourth, and

Sixth Circuits] have had any effect—much less that the sky has fallen in—on the foreclosure laws of those states," *Ho*, 858 F.3d at 588 (Korman, D.J., dissenting in part and concurring in part). Similarly, the FDCPA can be read to permit the continued operation of other state foreclosure laws. *Cf. Heintz*, 514 U.S. at 296-97 (concluding that "it is easier to read § 1692c(c) as containing some additional, implicit, exception than to believe that Congress intended, silently and implicitly, to create a far broader exception, for all litigating attorneys, from the Act itself").

2. Even if there were an irreconcilable conflict between the FDCPA and a state foreclosure law, the FDCPA explicitly preempts state law in that rare circumstance. The Act's preemption clause leaves in place "the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of [the FDCPA], and then only to the extent of the inconsistency." 15 U.S.C. § 1692n. The FDCPA also makes clear that "a State law is not inconsistent with [the FDCPA] if the protection such law affords any consumer is greater than the protection provided by [the FDCPA]," *id.*, thereby expressly allowing states to go above and beyond the FDCPA's requirements and provide greater protections to their residents.

It would be particularly strange to refuse to apply the FDCPA's restrictions to non-judicial foreclosure because of a conflict with state law given that Congress's original purpose in passing the FDCPA was to protect consumers where states were *failing* to do so. As Representative Annunzio explained when he introduced the bill, at the time there was "no effective debt collection regulation or law in 25 States, leaving over 80 million people completely unprotected from the demeaning and threatening techniques practiced by

some collectors." 122 Cong. Rec. H7177 (daily ed. July 1, 1976). Senator Biden similarly discussed how "[s]tates have failed to provide adequate protection in this area." 122 Cong. Rec. S16273 (daily ed. Sept. 21, 1976). In fact, many states at the time regulated debt collection through licensing boards that consisted mostly of other debt collectors. 123 Cong. Rec. S3484 (daily ed. Mar. 4, 1977). In short, Congress passed the FDCPA because of a "lack of meaningful legislation on the State level" to provide "effective protection . . . from debt collection abuse." S. Rep. No. 95-382, at 1696-97 (1977). To turn around now and limit the Act's reach because of a purported conflict with state law would be contrary to Congress's plan in passing the law.

Furthermore, Congress passed the FDCPA "to promote *consistent* State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e) (emphasis added). For that reason, it "enacted the FDCPA despite the fact that some states already had procedural requirements for debt collectors . . . in place, because it 'decided to protect consumers who owe money by adopting a *different, and in part more stringent, set of requirements* that would constitute *minimum national standards* for debt collection practices.'" *Piper*, 396 F.3d at 236 n.11 (quoting *Romea v. Heiberger & Assocs.*, 163 F.3d 111, 118 (2d Cir. 1998)) (emphasis added). Given Congress's plan that there be consistent protections for consumers across states, it makes little sense to undermine the Act's protections by exempting a large swath of debt collectors simply because of possible conflicts with state foreclosure laws. Congress passed the FDCPA so that it—and not state laws—would establish the national floor for restrictions on *all* debt collectors. States can, of course, go above this floor and enact even more stringent

restrictions on debt collection, as the FDCPA itself makes clear.

Finally, the FDCPA also contains a mechanism for exempting certain debt collection practices from the Act's requirements when state laws are sufficiently protective of consumers. That provision states that the Consumer Financial Protection Bureau (and before it, the Federal Trade Commission) "shall by regulation exempt from the requirements of this subchapter any class of debt collection practices within any State if the Bureau determines that under the law of that State that class of debt collection practices is subject to requirements substantially similar to those imposed by this subchapter, and that there is adequate provision for enforcement." 15 U.S.C. § 1692o. Thus, to the extent the Act truly is irreconcilable with state laws that provide similar levels of protection to debtors facing non-judicial foreclosures, the Bureau can—indeed must—provide exemptions from the Act's requirements. *See, e.g.*, *FTC Notice of Maine Exemption From The Fair Debt Collection Practices Act*, 60 Fed. Reg. 66972, 66973 (Dec. 27, 1995) (granting Maine's request for an exemption from certain FDCPA provisions because "the level of protection to consumers under the Maine Act is substantially equivalent to that provided in the FDCPA").

In short, there is no conflict between state foreclosure laws and the FDCPA, and even if there were, the FDCPA expressly preempts inconsistent state laws and provides a mechanism to exempt certain of its requirements in states that provide adequate, alternative protections. Thus, purported conflicts with state law provide no reason to interpret the Act in a manner that is inconsistent with its text and Congress's plan in passing it.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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17-1307

IN THE
SUPREME COURT OF THE UNITED STATES

DENNIS OBDUSKEY,

Petitioner,

v.

MCCARTHY & HOLTHUS, LLP, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

AMICUS CURIAE BRIEF OF THE MICHIGAN CREDITORS BAR ASSOCIATION IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS*[1]

The Michigan Creditors Bar Association ("MCBA") is an organization of Michigan attorneys who practice in the areas of debt collection and creditors' rights. MCBA members are committed to the professional, responsible and ethical representation of creditors, including mortgagees and loan servicers. Michigan law provides for non-judicial foreclosure and, after the Sixth Circuit decided *Glazer v. Chase Home Finance, LLC*, 704 F.3d 453 (6th Cir. 2013), members of the MCBA experienced first-hand the encroachment of federal law on Michigan's non-judicial foreclosure process, to the detriment of both consumers and mortgage lenders. As set forth in this brief, MCBA's members' direct experience with the expansion of the Fair Debt Collection Practices Act ("FDCPA") to non-judicial foreclosure proceedings refutes the contentions of Petitioner and his supporting *amicus* that any conflict between state law and the FDCPA is hypothetical or avoidable. The MCBA hopes the Court will benefit from the MCBA's perspective.

SUMMARY OF ARGUMENT

The experience of Michigan foreclosure attorneys disproves the contention of Petitioner and

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no party or counsel for a party had any role in authoring this brief. No one other than *amicus curiae* and its counsel made a monetary contribution to the preparation and submission of this brief. Counsel for the parties have filed letters of blanket consent to the filing of *amicus* briefs.

his *amicus* that the FDCPA can be reconciled with non-judicial foreclosure statutes. The application of the FDCPA to Michigan's non-judicial foreclosure process has created an actual and material conflict between the FDCPA and Michigan law. Federal district courts faced with the issue uniformly held that an attorney effectuating a non-judicial foreclosure through the Michigan statute violates the FDCPA's prohibition against communicating about a consumer debt with third parties. This Court's required deference to principles of federalism prohibit it from construing the FDCPA in a way that would displace state non-judicial foreclosure statutes because the FDCPA contains no clear indication that Congress intended to preempt state non-judicial foreclosure laws.

ARGUMENT

A. Michigan's Non-judicial Foreclosure Statute Protects Michigan Consumers.

Michigan's foreclosure by advertisement statute, codified at Mich. Comp. Laws § 600.3201 *et seq.*, has been extant for almost 200 years. *See Kimmell v. Willard's Adm'r*, 1 Doug. 217 (Mich. 1843). Michigan's statute only allows foreclosure by advertisement in the event of a default that triggers a "power of sale" provision in a mortgage and if no lawsuit has been filed to collect the debt secured by the mortgage. Mich. Comp. Laws § 600.3204. Only the owner of the underlying indebtedness or its servicer has standing to initiate foreclosure proceedings and, if the party seeking to foreclose is not the original mortgagee, a chain of title must be recorded prior to the sale. *Id.*

The statute also requires that notice of the proposed foreclosure sale be published for four successive weeks in a newspaper distributed in the county where the property is located and that a copy of the notice of foreclosure sale be posted in a conspicuous place on the property. Mich. Comp. Laws § 600.3208. The notice must include, *inter alia*, the name of the mortgagor and the amount due on the note as of the date of the notice. Mich. Comp. Laws § 600.3212. After the appropriate notice period, the property is sold at auction to the highest bidder by "the person appointed for that purpose in the mortgage" or by a county sheriff. Mich. Comp.

Laws § 600.3216. A mortgagor has either six months or one year to redeem the property after it is sold and information related to the redemption period must be included in the notice of foreclosure. Mich. Comp. Laws §§ 600.3212, 600.3240.

If the sale proceeds are not sufficient to retire the note, a mortgagee must file suit if it wants to collect any deficiency. The mortgagor may assert as a defense to such action that the sale price was less than the property's "true value." Mich. Comp. Laws § 600.3280. A mortgagor also has a common law right to sue for wrongful foreclosure, because under Michigan law, "defects or irregularities in a foreclosure proceeding result in a foreclosure that is voidable." *Kim v. JP Morgan Chase Bank, N.A.*, 493 Mich. 98, 115, 825 N.W.2d 329 (2012). In order to void a sale, a mortgagor must "show that they would have been in a better position to preserve their interest in the property," had the mortgagee complied with the statute. *Kim*, 493 Mich. at 116.

The Michigan Legislature enacted the statute "'to enlarge and not to cut down the rights of mortgagors." *Northrip v. Federal Nat. Mortg. Ass'n*, 527 F.2d 23, 27 (6th Cir. 1975), citing *Reading v. Waterman*, 46 Mich. 107, 110, 8 N.W. 691 (1881). For example, the notice requirement was implemented "to inform the mortgagor so that he may see that a price adequate to protect his interests is obtained at the sale." *Schulthies v. Barron*, 16 Mich. App. 246, 248, 167 N.W.2d 784 (1969). The Michigan Legislature revised the statute in 2009 to address the foreclosure crisis caused by the Great

Recession by providing mortgagors with additional rights, including the right to request a meeting with the mortgagee or servicer to discuss a loan modification and, if such a meeting were requested, a 90 day stay of the foreclosure sale to allow the parties to attempt to negotiate a loan modification. Mich. Comp. Laws § 600.3205a (2009). These provisions were repealed effective June 20, 2014, after the foreclosure crisis had abated. *See* Michigan Public Act 105 of 2013.

Over the course of its existence, Michigan's foreclosure by advertisement statute has been repeatedly upheld as being consistent with principles of due process. *See e.g. Garcia v. Federal Nat. Mortg. Ass'n*, 782 F.3d 736 (6th Cir. 2015) (holding that the notice required by the statute did not violate the plaintiffs' due process rights); *Cramer v. Metropolitan Savings & Loan Ass'n*, 401 Mich. 252, 259, 258 N.W.2d 20 (1977) (holding that the statute poses no due process question). Michigan law provides mortgagors with the opportunity to redeem the property after a sale and a process for ensuring that the sale was fair. When extensive federal regulation of the mortgage industry failed to stop the foreclosure crisis that devastated Michigan, the Michigan Legislature took swift, direct and focused action to protect its citizens.

B. Grafting the FDCPA on to Michigan's Non-judicial Foreclosure Statute Created an Actual and Material Conflict.

After the Sixth Circuit decided *Glazer v. Chase Home Finance, LLC*, 704 F.3d 453 (6th Cir. 2013), mortgage attorneys in Michigan were besieged with FDCPA lawsuits, charging that the publication of notices of foreclosure under Mich. Comp. Law § 600.3208 violated 15 U.S.C. § 1692c(b)'s prohibition against communicating with third-parties about consumer debts.[2] Thus, what the *Obduskey* court noted as a "potential" area of conflict between Colorado's non-judicial foreclosure statute and the FDCPA, has become an actual conflict in Michigan. *Obduskey v. Wells Fargo, N.A.*, 879 F.3d 1216, 1222 (10th Cir. 2018). Federal district courts sitting in Michigan that were faced with the issue of whether the statutory notice violated the FDCPA

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[2] That section of the FDCPA provides:

> Except as provided in section 1692b of this title, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

found universally that a mortgagor stated a claim against an attorney for a violation of 15 U.S.C. § 1692c(b) based on the attorney's publication of a statutory notice of foreclosure. *See e.g. Thebert v. Potestivo & Assoc.*, Case No. 16-CV-14341, 2017 WL 3581322 at * 5 (E.D. Mich. Aug. 18, 2017), collecting cases. There were no reported exceptions.

Further, after *Glazer*, foreclosure attorneys attempted to comply with the FDCPA by including in the foreclosure notice the disclaimer mandated by 15 U.S.C. § 1692e(11).[3] This action launched a second round of litigation, with district courts finding that an attorney violates the FDCPA by including the mandatory FDCPA language in a notice of foreclosure, because the FDCPA disclaimer is not required by Michigan's foreclosure statute. *See e.g. Thompke v. Fabrizio & Brook, P.C.*, 261 F. Supp. 3d 798, 811 (E.D. Mich. 2017). These courts thus found that attorneys violated one part of the FDCPA by following a different part of the FDCPA.

Petitioner contends that the conflict between 15 U.S.C. § 1692c(b) and the public notice requirements in most non-judicial foreclosure statutes can be resolved through "sensible" interpretations of the FDCPA, but offers no hint as to what the "sensible" interpretation may be. *See* Brief of Petitioner at p. 27. Certainly the federal courts in Michigan forced to apply *Glazer* failed to

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[3] This provision requires debt collectors to disclose in every communication that the communication is from a debt collector.

find a "sensible" resolution to the conflict. *See e.g. Salewske v. Trott & Trott, PC.*, Case No. 16-CV-13326, 2017 WL 9470708 at *5, n. 4 (E.D. Mich. March 16, 2017), aff'd with modifications 2017 WL 2888998 (E.D. Mich. July 7, 2017) (noting that application of FDCPA to non-judicial foreclosures created a "'damned if you do, damned if you don't' plight" and posed an "unavoidable risk of litigation.")

Amicus The National Consumer Law Center ("NCLC") dismisses the patent conflict by noting that the FDCPA's ban against communications with third-parties contains several exceptions which militate against any conflict. *See* Brief of *Amicus* National Consumer Law Center at pp. 23 – 24. NCLC suggests, for example, that the foreclosure notices are exempt from 15 U.S.C. § 1692c(b) because the FDCPA allows communications made with "the express permission of a court of competent jurisdiction." *Id.* Michigan's non-judicial foreclosure statute does not require any court intervention, let alone "the express permission" of a court. Indeed, a similar argument was rejected by a federal district court sitting in Michigan, on the ground that the notice of foreclosure was not required by "order of court." *Walker v. Fabrizio & Brook, P.C.*, Case No. 17-11034, 2017 WL 5068340 at * 6 (E.D. Mich. Nov. 2, 2017).

NCLC's Brief next contends that the "consent to sale" provisions in most mortgages constitutes "the prior consent of the consumer given directly to the debt collector," an additional exception to 15 U.S.C. § 1692c(b)'s bar on third-party

communications. *See* Brief of NCLC at p. 23. Federal courts in Michigan rejected this argument, because the "consent to sale" was not given "directly to the debt collector."[4] *See e.g. Thebert*, 2017 WL 3381322 at *6. NCLC cites one of the Michigan cases rejecting the "prior consent" argument in support of its position that "consent" avoids the conflict. *See* Brief of NCLC at p. 23, citing *Walker*, 2017 WL 5068340 at *3. The *Walker* court found that any consent to publication by the mortgagor was initiated by the inclusion of the 15 U.S.C. § 1692e(a) disclaimers. *Walker*, 2017 WL 5068340 at *1, 4. The *Walker* decision thus underscores the conflict between the Michigan statute and the FDCPA, it does not resolve the conflict, as NCLC suggests.

Grafting the FDCPA onto Michigan's non-judicial mortgage foreclosure process did not result in litigation targeted at the alleged fraud and abuse in the foreclosure process, as the Petitioner and his supporting *amicus* suggest. Rather, the *Glazer* decision launched a concerted attack aimed at eliminating Michigan's non-judicial foreclosure process all together. Simply put, under the current

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[4] NCLC also relies on *Maynard v. Cannon*, 650 F. Supp. 2d 1138, 1144 (D. Utah 2008) for its position. In that case, the court held that non-judicial foreclosures were not covered by the FDCPA. The *Maynard* court found in the alternative that the plaintiff gave her consent to disclose the debt "directly to the debt collector" when she executed a deed in trust in favor of a "trustee" because the defendant-debt collector was made trustee prior to initiating the foreclosure process. Attorneys following the Michigan statute are agents of the mortgagee or servicer and the reasoning in *Maynard* does not apply to them.

rulings of federal courts, it is not possible for attorneys to follow the foreclosure process outlined in the Michigan statute without violating the FDCPA's prohibition against disclosing a consumer debt to a third-party. The conflict is real and unavoidable.

C. The Definition of "Debt Collector" Should Not Be Construed to Include Attorneys Effecting Non-judicial Foreclosures.

Whether the FDCPA proscribes the conduct of attorneys engaged in non-judicial foreclosures requires judicial construction of the term "debt collector." *Vien-Phuong Thi Ho v. ReconTrust Co., N.A.*, 858 F.3d 568, 576 (9th Cir. 2017); *Glazer*, 704 F.3d at 460. Because foreclosure is a "field which the states have traditionally occupied,"[5] this Court's interpretation of the FDPCA must start with the "assumption that the historic powers of the State were not to be superseded" by the federal statute. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (considering whether the United States Warehouse Act, 7 U.S.C. § 241, *et seq.* prohibits state agency from setting grain warehousing rates). Put another way, this Court should not interpret a federal statute in a way that "would generate a

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[5] *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) ("It is beyond question that an essential state interest is at issue here: We have said that 'the general welfare of society is involved in the security of the titles to real estate' and the power to ensure that security 'inheres in the very nature of [state] government... '"), citations omitted.

conflict between state and federal law," because our federalist system demands that "the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Ho*, 858 F.3d at 576, citing *Rice, supra*.

This "clear and manifest" purpose or "plain statement" test is founded on this Court's strong fidelity to federalism. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Under this rubric, "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides" the balance between state and federal powers. *Id, citing Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243 (1985). In short, "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989), citing *Atascadero State Hospital*, 473 U.S. at 242.

This Court has already applied these principles in reviewing the issue of whether federal law should be construed to displace state foreclosure law, albeit in a different context. *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994). The question in *BFP* was whether a mortgagor who filed bankruptcy could bring a fraudulent transfer suit under 11 U.S.C. § 548 in order to void a foreclosure sale performed under state law. The debtor maintained that the sale price reached at the foreclosure sale was below market and therefore not "reasonably

equivalent value" under 11 U.S.C. § 548(a)(2). The *BFP* court found that the bankruptcy code could not be construed in a way that would allow a debtor to void a sale that was valid under state foreclosure law. This Court held that regulating "the security of titles to real estate" is "beyond question" an "essential state interest" and that interest should not be displaced absent the "clear and manifest" intention of Congress to do so. *BFP*, 511 U.S. at 544. In responding to the dissent's insistence that state practice cannot "trump the plain meaning of federal statutes" [*BFP*, 511 U.S. at 567], the *BFP* court found:

> We have no quarrel with the dissent's assertion that where the 'meaning of the Bankruptcy Code's test is itself clear,' [citation omitted], its operation is unimpeded by contrary state law or prior practice. Nor do we contend that Congress must override historical state practice 'expressly or not at all.' [citation omitted]. The Bankruptcy Code can of course override by implication when the implication is unambiguous. ***But where the intent to override is doubtful, our federal system demands deference to long-established traditions of state regulation.***

BFP, 511 U.S. at 546, emphasis added.

A similar analysis is warranted here. The word "foreclosure" does not appear in the FDCPA or its legislative history. S. Rep. 95-382 (1977). If Congress intended the FDCPA to displace state non-judicial foreclosure statues, "its failure to hint at it is spectacularly odd," given the prevalence of such statutes at the time the FDCPA was enacted. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 491 (1996) (finding 21 U.S.C. § 360(k) did not bar state tort law causes of action where legislative history did not suggest "a sweeping pre-emption of traditional common law remedies.") *See* Brief of NCLC at p. 4 (noting the jurisdictions permitting non-judicial foreclosures). Given that Michigan's statute would in fact be displaced by the application of the FDCPA to non-judicial foreclosures, the question before the Court is not whether the FDCPA could be construed to indicate such a displacement, but whether it is "unmistakably clear in the language of the statute" that Congress intended such a displacement. *Will*, 491 U.S. at 65. The answer is unequivocally, "No." Indeed, the analytical gymnastics employed by the Circuit Courts of Appeals that found the term "debt collector" to include attorneys engaged in foreclosure practice (exercises mimicked by Petitioner and his supporting *amicus)* evidences the lack of "clear and manifest intent" by Congress to use the FDCPA to displace state non-judicial foreclosure law. *See e.g. Glazer*, 704 F.3d at 460 – 465; *Wilson v. Draper & Goldberg, PLLC*, 443 F.3d 373, 375 – 377 (4th Cir. 2006).

Finally, Petitioner suggests but does not really argue that 15 U.S.C. § 1692n demonstrates

Congress's express intent to preempt all state laws that touch on the field of "debt collection." That provision provides:

> This subchapter does not annul, alter, or affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency. For purposes of this section, a State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection provided by this subchapter.

This statute cannot be construed to preempt every state law that impacts the debtor-creditor relationship. Plainly, in enacting 15 U.S.C. § 1692n, Congress had in mind that a state debt collection practices statute (like Michigan's Regulation of Collection Practices Act, Mich. Comp. Laws § 445.252, *et seq.*) should be preempted where, for example, the state law permitted a debt collector to place collection calls until 6 p.m., but the FDCPA (hypothetically) only permitted calls until 5 p.m. There is no indication that Congress intended 15 U.S.C. § 1692n to annul state laws allowing non-judicial foreclosures. *See, e.g., Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 510 (9th Cir. 2002)

(finding debtor did not have a claim under the FDCPA for violation of the discharge injunction on ground there was no indication in either FDCPA or Bankruptcy Code that "Congress intended to allow debtors to bypass the Code's remedial scheme when it enacted the FDCPA.")

Michigan's non-judicial foreclosure statute benefits consumers in that it ensures a fair sale price, provides significant redemption rights and eliminates excessive court costs (which are chargeable to the mortgagor by statute) and attorneys' fees (which are typically awarded in loan documents). As stated above, Michigan's Legislature and its courts have provided Michigan citizens with a well-regulated procedure to protect mortgagors from improper foreclosure practices. That system and similar regimes in other states (including Colorado) cannot be displaced based on a tortured rendering of the FDCPA.

CONCLUSION

For the foregoing reasons, the judgment of the Tenth Circuit Court of Appeals should be affirmed.

Respectfully, submitted,

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November 7, 2018

No. 17-1307

In the Supreme Court of the United States

DENNIS OBDUSKEY,

Petitioner,

v.

MCCARTHY & HOLTHUS LLP, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF MORTGAGE BANKERS ASSOCIATION, AMERICAN BANKERS ASSOCIATION, BANK POLICY INSTITUTE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, AND WESTERN BANKERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

The Mortgage Bankers Association ("MBA") is a national association representing the real estate finance industry. It has more than 2,200 members, including real estate finance companies, mortgage companies, mortgage brokers, commercial banks, thrifts, life insurance companies, and others in the mortgage lending field. MBA seeks to strengthen the nation's residential and commercial real estate markets, to support sustainable homeownership, and to extend access to affordable housing to all Americans.

The American Bankers Association ("ABA") is the principal national trade association of the financial services industry in the United States. Founded in 1875, the ABA is the voice for the nation's $13 trillion banking industry and its million employees. ABA members—located in all fifty states, the District of Columbia, and Puerto Rico—include financial institutions of all sizes and hold a majority of the domestic assets of the U.S. banking industry. The ABA frequently appears in litigation involving issues of widespread importance to the industry.

The Bank Policy Institute ("BPI") is a nonpartisan public policy, research, and advocacy group, and the successor to the Clearing House Association and the Financial Services Roundtable after their merger in 2018. Members of the BPI include universal

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, and their counsel made a monetary contribution to its preparation or submission. All parties have filed blanket consents to the filing of *amicus curiae* briefs with the Clerk.

banks, regional banks, and major foreign banks doing business in the United States. BPI members employ nearly two million Americans and make 72% of all loans and nearly half of the nation's small business loans.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The Securities Industry and Financial Markets Association ("SIFMA") is a trade association that brings together the shared interests of more than 600 securities firms, banks, and asset managers. Formed as a result of the November 1, 2006 merger between the Securities Industry Association and The Bond Market Association, SIFMA's mission is to promote policies and practices to expand and perfect markets, foster the development of new products and services, and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests locally and globally.

The Western Bankers Association ("WBA") is one of the largest banking trade associations and regional educational organizations in the United States,

with more than 100 years of combined experience serving banks. The California Bankers Association, a division of the WBA, is the advocate of the western banking industry for needed legislative, regulatory and legal changes.

Many of *amici*'s members are mortgage lenders or servicers that depend on the non-judicial foreclosure processes available in many States in order to prevent serious financial losses on mortgage loans, which enables them to deliver lower-cost credit to home buyers. They therefore have a strong interest in whether entities engaged in a non-judicial foreclosure are subject to the requirements of the Fair Debt Collection Practices Act ("FDCPA"). *Amici* file this brief to explain why applying the FDCPA to non-judicial foreclosures would be inconsistent with the statute's text and introduce an additional, unwarranted layer of complexity in the foreclosure process, thereby harming both lenders and borrowers.

INTRODUCTION AND SUMMARY OF ARGUMENT

Our country's mortgage lending system—a critical element of our national policy of making home ownership available to as many Americans as possible—rests on the foundation of enforceable security interests in real property. By allowing lenders to take possession of collateral through foreclosure when a borrower defaults, the law reduces the risk to lenders—which in turn allows them to make credit available to more home buyers at a lower interest rate.

Some foreclosures occur through lawsuits in court, but more than half of the States provide for non-judicial foreclosures, which streamline the fore-

closure process while at the same time including significant procedural protections for borrowers.

The entire purpose of non-judicial foreclosure is to avoid the costs and delay of litigation, which inevitably would result from judicial involvement in the foreclosure process. Under petitioner's view, however, a borrower would be able to circumvent a State's limitation of judicial involvement by instituting a lawsuit under the FDCPA to challenge non-judicial foreclosure activity.

This Court should reject that result and hold that the FDCPA's requirements do not extend to enforcing a security interest by initiating a non-judicial foreclosure.

First, contrary to the suggestions of petitioner and his *amici*, subjecting non-judicial foreclosures to the FDCPA will harm borrowers, not help them. Many States and several federal agencies (such as the Bureau of Consumer Financial Protection) already have regulations in place that protect borrowers facing non-judicial foreclosure. These regulations are designed to fit the non-judicial foreclosure process, and therefore are both consistent with the structure of non-judicial foreclosure and strike the proper balance between allowing borrowers to vindicate their rights and ensuring that appropriate foreclosures can proceed in a timely, efficient, and fair manner.

Superimposing the FDCPA's requirements on this already-extensive framework of regulation would create considerable uncertainty, leaving lenders and servicers to determine whether and to what extent the FDCPA preempted state laws and, if not, how to comply with both state and federal require-

ments. The resulting confusion would make it more costly for lenders and servicers to do business—and thus more costly for home buyers to obtain credit.

Nor would borrowers reap any benefit from application of the FDCPA. The FDCPA's procedural requirements were enacted decades ago chiefly to address third-party collection of unsecured consumer debts—not the very different process of foreclosure. They would add little protection for borrowers that is not already provided by the robust protections under state and federal law. Indeed, the FDCPA's provisions—such as its restrictions on when "debt collectors" may communicate with borrowers—would interfere with lenders and servicers' attempts to provide borrowers with information to help them avoid foreclosure and stay in their homes, communications that are mandated by state and federal law.

Second, settled principles of statutory interpretation establish that the FDCPA does not cover nonjudicial foreclosure activity. The FDCPA applies to the collection of money from borrowers—and a nonjudicial foreclosure does not involve collecting *money* from a borrower. Indeed, the entire point of nonjudicial foreclosure is that the mortgage is satisfied (in whole or in part) by the sale of the property collateralizing the mortgage and *not* through repayment by the borrower. And the title to the property involved in a foreclosure is often held not by the borrower but rather by a trustee to secure the mortgage.

Moreover, the FDCPA's text makes plain that entities seeking to enforce a security interest are covered by the FDCPA only for the purposes of one narrow statutory provision—and the inclusion of that specific provision makes clear that such entities are *not* covered by the rest of the statute. To hold

otherwise would be inconsistent with the statutory language—and would imply that many valuable communications directed at borrowers are unlawful. This Court should reject that result.

ARGUMENT

The FDCPA Does Not Apply To Non-Judicial Foreclosures.

A. Subjecting Foreclosures To The Detailed Requirements Of The FDCPA Would Harm Consumers, Create Confusion, And Increase Borrowing Costs.

Many States and the federal government have long recognized that non-judicial foreclosure is different in kind from the types of debt collection that led to the FDCPA's enactment and therefore have subjected these distinct procedures to different regulatory regimes. Layering the FDCPA's requirements on top of the existing regulations governing non-judicial foreclosure is both unnecessary and unwise. Doing so will serve only to increase the regulatory burden on lenders, thereby needlessly driving up costs for lenders and borrowers.

1. Non-judicial foreclosure is different in kind from the third-party collection of consumer debt targeted by the FDCPA.

Petitioner and his *amici* assume that non-judicial foreclosure on a security interest is not meaningfully different from third-party collection of consumer debt and should therefore be regulated the same way. See

Pet. Br. 22-23; NAACP Br. 11. That assumption is misguided.[2]

The first and most obvious difference is that mortgage debt is *secured* debt. Unsecured debt—in other words, debt that is not guaranteed by any collateral—has long been recognized as falling under the FDCPA. In a mortgage transaction, by contrast, the property that the borrower purchases serves as collateral (similar to collateralized debt in the auto lending context).[3] And precisely because enforcement of the security interest provides a fallback when a borrower fails to pay the money owed, mortgage lenders bear less risk from nonpayment.[4]

Moreover, the foreclosure context is different because mortgage debt tends to involve greater amounts of money and higher monthly payments

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[2] *Amici* here focus on the question presented—whether non-judicial foreclosure activities fall within the scope of the FDCPA—and take no position on whether the FDCPA applies to judicial foreclosures.

[3] This brief refers to mortgages and deeds of trust interchangeably except where the differences between the two types of instruments are relevant. Significantly, in most States that authorize non-judicial foreclosures, "the deed of trust is the most commonly used mortgage instrument." Grant S. Nelson, 1 Real Estate Finance Law § 7:20 (6th ed. 2014); see also Freddie Mac, *First Lien Security Instruments*, http://www.freddiemac.com/uniform/unifsecurity.html#highlights (indicating that in 19 of the 33 States permitting non-judicial foreclosure, the applicable Fannie Mae/Freddie Mac Security Instrument is a deed of trust).

[4] See, *e.g.*, Experian, *Secured vs. Unsecured Loans: What You Should Know*, perma.cc/DV5X-9TMX ("Because a secured loan ensures the lender walks away with something of value even if you don't repay the loan, secured loans are generally considered lower risk.").

than other kinds of debt. For example, the median family's debt secured by a primary residence was $111,000 in 2016, whereas the median family's credit card debt was $2,300.[5]

A mortgage borrower is therefore less likely than other kinds of debtors to catch up and repay his debt in full once he has fallen behind in his payments.[6] The character of lenders' communication with borrowers reflects this reality: Mortgage lenders take an approach that focuses on loss mitigation, working with borrowers to restructure the debt or to help make monthly payments more manageable for the borrower. Thus, even if certain collection activities by servicers are covered by the FDCPA, it makes more sense to regulate *foreclosure* with an eye toward the special characteristics of foreclosures—which is just what States and federal agencies have done.

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[5] See, *e.g.*, Federal Reserve, *Changes in U.S. Family Finances from 2013 to 2016: Evidence from the Survey of Consumer Finances* (Sept. 2017), perma.cc/CG9K-N86F.

[6] Compare, *e.g.*, S&P Global Ratings, *U.S. Residential Mortgage Performance Snapshot* 14 (July 2018), perma.cc/5T7V-5GXH (indicating that the cure rate for various tranches of U.S. prime mortgages as of July 2018 fell between 2% and 6%), *with* Philippe d'Astous & Stephen H. Shore, *Liquidity Constraints and Credit Card Delinquency: Evidence from Raising Minimum Payments* 3 (Apr. 25, 2015), http://ibhf.cornell.edu/docs/Symposium%20Papers/LiquidityConstraints.pdf (finding a "base cure rate of 52%" for delinquent credit card borrowers at a particular large financial institution).

2. Borrowers in non-judicial foreclosure proceedings already have extensive protections under state and federal law.

Non-judicial foreclosure is already regulated intensively at both the state and federal levels—with each State and each federal agency making a policy judgment about the regulatory standards appropriate in light of the special characteristics of the non-judicial foreclosure context.

Many of these procedures are designed specifically to apply to the foreclosure process, and their features are accordingly tailored to the particular needs of mortgage lenders and borrowers. Application of the FDCPA to non-judicial foreclosure activity is therefore a solution in search of a problem.

1. Thirty-three States and the District of Columbia permit non-judicial foreclosures.[7] The primary purpose of this procedure is to reduce the need for judicial involvement in order to make the process more efficient.

Lengthier judicial foreclosures have significant drawbacks—including the "misallocation of public funds" on adjudicating uncontested foreclosures and the risks of "vandalism, fire loss, depreciation, damage, and waste" to the property while the process is drawn out in court. See Nat'l Conf. of Commissioners on Uniform State Laws, Uniform Nonjudicial Fore-

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[7] These States are: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Georgia, Hawaii, Idaho, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming. See Nelson, *supra* note 3, § 7:20 n.1.

closure Act, Prefatory Note at 2 (2002), http://www.uniformlaws.org/shared/docs/nonjudicial%20foreclosure/nonjudicial_foreclosure_final_02.pdf. These adverse consequences of judicial foreclosures "have a negative impact on local property values, particularly during periods of recession," and drawn-out foreclosures can also "lead to direct costs for local governments" that must deal with abandoned properties. See Americans for Fin. Reform, *We All Pay a Price for the Foreclosure Crisis*, Feb. 28, 2011, http://ourfinancialsecurity.org/2011/02/we-all-pay-a-price-for-the-foreclosure-crisis.

To achieve the goal of making foreclosures more expeditious and efficient without reducing protections for borrowers, States impose stringent requirements on lenders seeking to conduct non-judicial foreclosures, many of which supplement or overlap with the requirements of federal laws directed at the foreclosure process. See, *e.g.*, *Rossberg* v. *Bank of Am., N.A.*, 219 Cal. App. 4th 1481, 1492 (2013) (noting that the purposes of California's statutory scheme are "to provide the [lender] with a quick, inexpensive and efficient remedy" and "to protect the [borrower] from wrongful loss of the property") (quotation marks omitted); *Cox* v. *Helenius*, 693 P.2d 683, 685-86 (Wash. 1985) (explaining that the objectives of Washington's non-judicial foreclosure law include ensuring "efficient and inexpensive" procedures and "provid[ing] an adequate opportunity for interested parties to prevent wrongful foreclosure").

For example, in a number of States, the lender must notify the borrower of available options for loss mitigation (such as a loan modification) before commencing the non-judicial foreclosure process. California's Homeowner Bill of Rights, for instance, re-

quires a mortgage servicer to make initial contact with a delinquent borrower by phone or in person to "assess the borrower's financial situation and explore options for the borrower to avoid foreclosure." Cal. Civil Code § 2923.5(a)(2). The borrower has the right to request a subsequent meeting on these issues, which must occur within 14 days. *Ibid.* Similarly, Minnesota's Homeowner Bill of Rights requires servicers to notify a borrower in writing of "available loss mitigation options offered by the servicer that are applicable to the [borrower's] loan before referring the mortgage loan to an attorney for foreclosure." Minn. Stat. § 582.043, subd. (5)(1).

Other States require the lender to provide opportunities for loss mitigation at other stages of the process. For example, in Maryland, a lender must include a loss mitigation application, and instructions for completing it, with the initial notice of intent to foreclose on any owner-occupied residential property. Md. Code. Ann. Real Prop. § 7-105.1(c)(5). Idaho similarly requires a loan modification form to accompany a notice of default. Idaho Code § 45-1506C(2)(a).

States may also give a homeowner a right to request mediation with the lender regarding loss mitigation options. In Nevada, a homeowner who has a documented financial hardship may file a petition with a state court electing mediation. Nev. Rev. Stat. § 107.0865(1). The lender must include information on how to petition for mediation with the initial notice of default. *Id.* § 107.086(2)(a)(4). Similarly, Rhode Island gives borrowers the right to a mediation conference and requires lenders to notify borrowers of their mediation rights before they may foreclose. 34 R.I. Gen. Laws § 34-27-3.2(d). The Washington Department of Commerce administers a

mediation program, to which borrowers can be referred by housing counselors or attorneys. See Wash. Rev. Code § 61.24.163. And borrowers in Idaho have the right to request a meeting with representatives of their lenders with authority to modify their loans. Idaho Code § 45-1506C(4).

A borrower's application for a loan modification or other loss-mitigation option may trigger the protections of State "dual tracking" laws. These laws prohibit lenders from proceeding with a non-judicial foreclosure while a loss-mitigation application is pending. See, *e.g.*, Cal. Civil Code § 2924.11(a); Minn. Stat. § 582.043(6)); Nev. Rev. Stat. § 107.530(1). In certain States, these stays of foreclosure also extend through a borrower's appeal if the application for loss mitigation is denied. Minn. Stat. § 582.043, subd. 6(a)(1); Nev. Rev. Stat. § 107.530(5)(b).

If the debtor does not pursue loss mitigation or if loss mitigation efforts are unsuccessful and a lender commences a non-judicial foreclosure, every non-judicial foreclosure State requires the lender to send the debtor notice of its intent to foreclose and to sell the property. See 4 Powell on Real Property § 37.42[4]. These notices "giv[e] debtors fair warning so they can take protective steps to preserve their equity in the property by attempting to redeem, refinance, or sell the property." *Ibid.* The content of such notices is often regulated by statute,[8] and lenders must carefully adhere to notice regulations in or-

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[8] See, *e.g.*, Me. Rev. Stat. Ann. tit. 14, § 6203-A (required contents of notice of sale and suggested form); Or. Rev. Stat. § 86.771 (2017) (required content of notice of sale); Va. Code Ann. § 55-62 (permissible form of notices of sale).

der to preserve their ability to foreclose.[9] Although some States permit publication notice, most States require at least notice by mail to the borrower, and some require personal service. See, *e.g.*, Md. Code Ann. Real Prop. § 7-105.1(h)(1) (personal service of notice to docket); Minn. Stat. § 580.03 (personal service of notice of sale); Okla. Stat. Ann. tit. 46, § 45 (same); Or. Rev. Stat. Ann. § 86.774(1) (same); S.D. Codified Laws § 21-48-6.1 (same).

Finally, a number of States provide for judicial or other neutral supervision of non-judicial foreclosures. Petitioner's home state of Colorado, for example, designates a "public trustee" in each county who oversees non-judicial foreclosures. See Colo. Rev. Stat. §§ 38-37-101 to -113. In order to initiate a non-judicial foreclosure, a lender must file a notice of demand and evidence of the debt with the public trustee (*id.* § 38-38-101(1)), and the public trustee must review the filing for completeness and record the notice of demand in order to commence the process (*id.* § 38-38-102(1)).

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[9] See, *e.g.*, *Fed. Nat'l Mortg. Ass'n* v. *Marroquin*, 74 N.E.3d 592, 593 (Mass. 2017) ("[A] foreclosure by statutory power of sale * * * is invalid unless the notice of default strictly complies with paragraph 22 of the standard mortgage."); *Nat'l Commerce Bank* v. *Stiehl*, 866 S.W.2d 706, 708 (Tex. App. 1993) (noting that "[c]ompliance with notice conditions contained in a deed of trust and as prescribed by law is a prerequisite to the right" to conduct non-judicial foreclosure sale); *Deep* v. *Rose*, 364 S.E.2d 228, 232 (Va. 1988) (holding that foreclosure sales made in violation of mandatory time periods between advertisement and sale are void); *LeDesma* v. *Pioneer Nat'l Title Ins. Co.*, 629 P.2d 1007, 1009 (Ariz. Ct. App. 1981) ("[S]trict compliance with notice requirements is essential to a valid [foreclosure] sale.").

Colorado Rule of Civil Procedure 120 then provides for a limited, streamlined form of judicial oversight. Under Rule 120, a lender seeking to foreclose and sell the property must file a verified motion in a state district court for authorization of the sale. Colo. R. Civ. P. 120(a). The borrower is notified of the motion and afforded an opportunity to respond. *Id.* 120(b)-(c). Even if the borrower does not respond, the court cannot authorize the foreclosure sale unless it determines that "there is a reasonable probability that a default justifying the sale has occurred" and that the moving party "is the real party in interest." *Id.* 120(d)(1).

North Carolina similarly requires a pre-sale hearing before the clerk of the court in the county where the property is located. At the hearing, the clerk examines whether the underlying debt is valid and the party seeking to foreclose is its proper holder, whether a default has occurred, and whether all state-law requirements have been met. N.C. Gen. Stat. § 45-21.16(d). If the clerk finds that the foreclosure may proceed, the borrower may appeal that decision to a state court after posting a bond. *Id.* § 45-21.16(d1).

Maryland takes a different approach by providing for court involvement in ratification of the sale at the end of the non-judicial foreclosure process. A borrower may identify any "irregularity" in the sale (Md. R. 14-305(d)(1)), and the court must be satisfied that the sale "was fairly and properly made" before the sale may be ratified (*id.* 14-305(e)).

Most significantly, even if a State does not provide for judicial involvement in the non-judicial foreclosure process itself, the "results are always subject to judicial review" on certain limited grounds. 4 Pow-

ell on Real Property § 37.42[1]. A borrower who experiences a wrongful foreclosure can bring an equitable proceeding to have a sale enjoined or set aside, or he or she may bring an action at law seeking damages for a wrongful sale. *Id.* § 37.42[6].

In short, non-judicial foreclosure is generally subject to a broad range of state-law protections, including loss-mitigation and notice requirements, the involvement of independent third parties in the sale, and the availability of judicial confirmation or review after the sale is complete. See Baxter Dunaway, 2 Law of Distressed Real Estate § 17:1 (2018). These statutory requirements, which "must be scrupulously followed" (*ibid.*), ensure a fair procedure for borrowers.

2. Several federal agencies also regulate the mortgage industry to protect borrowers from wrongful or unnecessary foreclosures. The Bureau of Consumer Financial Protection, for example, has promulgated a set of foreclosure regulations that emphasize early communication with borrowers facing foreclosure or the potential for foreclosure. Under the Bureau's rules:

- A servicer must attempt to make "live contact" with a borrower within 36 days of when the borrower becomes delinquent, and provide the borrower with written notice of loss mitigation options and available opportunities for homeownership counseling within 45 days. 12 C.F.R. § 1024.39(a), (b).
- Servicers must make personnel available to assist borrowers with loss mitigation

options until they are out of delinquency. *Id.* § 1024.40(a).

- Servicers must also offer application processes for loss mitigation options, and they may not initiate any foreclosure (whether judicial or non-judicial) before a borrower's application for loss mitigation (including an appeal as of right from any denial thereof) has been resolved. *Id.* § 1024.41.
- Finally, to the extent its existing regulations are insufficient, the Bureau retains the authority to use its enforcement and rulemaking powers to address "unfair, deceptive, or abusive act[s] or practice[s]" facing borrowers. See 12 U.S.C. § 5531.

The Federal Housing Administration imposes additional protections for borrowers whose mortgages it insures. Servicers of these mortgages must evaluate a defaulted mortgage for potential loss mitigation options, including forbearance plans and loan modifications, and implement those options "whenever feasible." See FHA Single Family Housing Policy Handbook 4000.1(III)(A)(2)(j) at 605-606. In addition, they must attempt to contact delinquent borrowers and document these communications. *Id.* 4000.1(III)(A)(2)(h) at 584-588.

The foregoing state- and federal-law protections are effective at ensuring that borrowers in non-judicial foreclosure States are given opportunities to avoid foreclosure. There is "almost no evidence that the longer judicial foreclosure process decreases the

foreclosure rate."[10] Put another way, there is no greater risk to borrowers of a foreclosure in States that authorize non-judicial foreclosure than in States that do not. Contrary to the suggestions of petitioner and his *amici*, therefore, there is no reason to believe that imposing the requirements of the FDCPA on non-judicial foreclosures is needed to protect borrowers against unjustified foreclosures, or that doing so would curb any alleged abuse in the system.

3. Subjecting non-judicial foreclosures to the FDCPA would create regulatory confusion and increase consumers' borrowing costs.

Applying the FDCPA in addition to the state and federal laws governing non-judicial foreclosure is not merely unnecessary to protect borrowers in the non-judicial foreclosure context. That result would also create unnecessary confusion, increase borrowing costs, and make borrower protections less, rather than more, effective.

Unlike the state and federal rules just discussed, Congress did not enact the provisions of the FDCPA with non-judicial foreclosures in mind; rather, the statute was aimed at addressing the practices of third-party debt collectors in connection with other kinds of debt. For example, the FDCPA requires that debt collectors: refrain from communicating with debtors represented by counsel (15 U.S.C. § 1692c(a)); cease communicating with a debtor once the debtor informs them that he wishes the communication to cease or that he "refuses to pay a debt"

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[10] See, *e.g.*, Yianni D. Lagos, *Fixing a Broken System: Reconciling State Foreclosure Law with Economic Realities*, 7 Tenn. J. L. & Pol'y 84, 104 (2011) (describing analysis of foreclosure rates per household in all 50 States over a three-year period).

(*id.* § 1692c(c)); refrain from communicating with any third party regarding a debt without the debtor's prior consent (*id.* § 1692c(b)); and "cease collection of [a] debt" that the debtor disputes until they can adduce verification of the debt (*id.* § 1692g(b)).

Because the FDCPA expressly preempts state laws to the extent they are "inconsistent with any provision" of the FDCPA (15 U.S.C. § 1692n), application of the FDCPA to non-judicial foreclosure could well invalidate many of the foreclosure-specific regulations adopted by States to provide borrowers with critical information and mitigation opportunities.

For example, many States' laws require lenders to provide particular notices to borrowers at particular times before a non-judicial foreclosure may proceed. See pages 12-13, *supra*. But the FDCPA prohibits communications with represented debtors, or with debtors who have indicated that they wish such communications to cease. In certain circumstances, these federal prohibitions would be in direct tension with state-law notification requirements and might preempt them—a counterproductive result that would deprive borrowers of information that many States have concluded is necessary to protect those borrowers' interests.

Similarly, the FDCPA's prohibition on contacting third parties without the debtor's permission might preempt state-law requirements for advertising a foreclosure sale. The preemption of these state-law regulations would not only interfere with States' own policy choices about how to regulate mortgage lending; it would also risk clouding the title of numerous properties, given that strict compliance with state laws is usually a prerequisite for a valid non-judicial foreclosure sale.

The FDCPA's requirements could also conflict with the requirements of federal laws. For example, FHA regulations require a face-to-face meeting between the lender and the borrower before three monthly payments are unpaid or after a default occurs (24 C.F.R. § 203.604(b))—a requirement that again could conflict with FDCPA provisions restricting communications with debtors, depending on the circumstances. Resolving conflicts such as this would be difficult for lenders and might require litigation.

In circumstances in which the conflict between the FDCPA and state law did not rise to the level necessary to trigger preemption, the FDCPA would impose additional federal requirements on top of existing state and federal regimes. Those additional requirements would be a poor fit for the foreclosure context and add needless regulatory complexity.

For example, the FDCPA's process for validating debts that are disputed (see 15 U.S.C. § 1692g(b)) would be an unnecessary overlay on top of Colorado's state-mandated non-judicial foreclosure process, which already prescribes procedures for verifying a debt and the lender's entitlement to foreclose. Forcing lenders to comply with these sorts of overlapping or duplicative requirements would increase the regulatory burden they face, with no corresponding benefit to borrowers.

The regulatory overlap and confusion that would result if non-judicial foreclosures were subject to the FDCPA would make it harder for many Americans to buy and keep homes, in two important ways.

First, imposing additional regulatory requirements on lenders and servicers will multiply their compliance costs. Lenders and servicers would have

to invest additional resources in ensuring that their day-to-day practices are in full compliance with the FDCPA, in addition to the costs of complying with already-applicable state and federal laws and regulations. In particular, they would need to anticipate when the various state laws with which they currently must comply are preempted by the FDCPA—and those preemption issues will require extensive litigation to resolve.

To the extent FDCPA obligations as well as state and federal foreclosure standards all applied to non-judicial foreclosures, lenders and servicers would be obligated to develop and implement strategies for complying with all of these requirements (where possible). The cost of all of these compliance efforts would be considerable, and lenders and servicers would likely be forced to pass some of those costs on to customers in the form of increases in the cost of credit.

Second, subjecting non-judicial foreclosures to the additional requirements imposed by the FDCPA would generally make it more difficult for lenders and servicers to foreclose when necessary. Increasing the number of steps that a party must take in order to obtain relief inevitably imposes added cost and delay.

Making it harder for lenders to foreclose would not benefit borrowers; on the contrary, it would disserve borrowers' interests by making it harder for would-be home buyers to get mortgages. Although foreclosure is never an optimal outcome for borrowers or lenders, the mortgage lending system depends on lenders' ability to foreclose as a last resort in the event of a default. Lenders are able to offer more mortgages—and to charge borrowers lower interest

rates for mortgage loans than for other kinds of debt—precisely because mortgages are secured by real property that can be foreclosed on when a mortgage cannot be repaid.

Non-judicial foreclosure, where authorized by state law, is a critical mechanism for ensuring that the foreclosure system works both fairly and efficiently. Judicial foreclosure—like any court proceeding—is a slow and resource-intensive process that makes it more expensive to provide mortgages. By contrast, non-judicial foreclosure, which avoids some of the procedural complications of judicial foreclosure, is a more "inexpensive and efficient remedy." *Vien-Phuong Thi Ho* v. *ReconTrust Co., NA*, 858 F.3d 568, 581 n.2 (9th Cir. 2017) (quotation marks omitted). It provides certainty and cost savings to lenders—which, in turn, translates into lower loan costs for borrowers.[11]

Applying the FDCPA to non-judicial foreclosures—making it harder for lenders to rely on the

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[11] Several federal regulators have recognized the importance of efficiency in the foreclosure process. For example, Department of Housing and Urban Development ("HUD") regulations require foreclosing lenders for FHA-insured mortgages to "exercise reasonable diligence in prosecuting the foreclosure proceedings to completion" (24 C.F.R. § 203.356) and set out what timeframe constitutes "reasonable diligence" in each State (see HUD, Mortgagee Letter 2016-03 at attach. 1 pp. 1-2 (Feb. 5, 2016), https://www.hud.gov/sites/documents/16-03ml.PDF). Fannie Mae and Freddie Mac likewise impose maximum time limits for foreclosures on mortgages they own. See Fannie Mae, *Foreclosure Time Frames and Compensatory Fee Allowable Delays Exhibit*, https://www.fanniemae.com/content/guide_exhibit/foreclosure-timeframes-compensatory-fees-allowable-delays.pdf; Freddie Mac, *Freddie Mac State Foreclosure Timelines*, http://www.freddiemac.com/singlefamily/service/pdf/exh83.pdf.

non-judicial foreclosure process and increasing judicial involvement in that process notwithstanding the judgment of many States that the process should be *less* encumbered by litigation—would leave borrowers worse off by increasing the cost of credit and the amounts they owe.

Moreover, applying the FDCPA to non-judicial foreclosures would create a new and significant source of litigation risk for lenders and servicers. That too, would increase credit costs.

FDCPA litigation has exploded over the last decade, with the number of FDCPA cases filed each year more than doubling between 2007 and 2015.[12] Subjecting lenders and servicers to the FDPCA when engaging in non-judicial foreclosure activity will surely lead to more lawsuits against these businesses.

That result is directly contrary to the entire reason that many States have adopted non-judicial foreclosure, which is to *avoid* protracted litigation in connection with the foreclosure process.

In sum, petitioners' position, if accepted by this Court, would for multiple reasons produce an increase in mortgage costs. The housing sector accounts for between 15% and 18% of gross domestic product each year[13]—which means that the resulting decrease in home sales, because of that increased cost, would have harmful ripple effects throughout the economy.

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[12] Consumer Fin. Protection Bureau, *Fair Debt Collection Practices Act: CFPB Annual Report 2016*, at 15 (Mar. 2016).

[13] See Nat'l Ass'n of Home Builders, *Housing's Contribution to Gross Domestic Product*, perma.cc/S8Y6-D6NF.

Given these adverse consequences, the Court should not presume that Congress intended to introduce an unnecessary layer of regulation into the area of non-judicial foreclosure by making it subject to the FDCPA—especially when, as we next discuss, the text of the statute provides no reason to do so.

B. A Non-Judicial Foreclosure Is Not The "Collection" Of A Debt Within The Meaning Of The FDCPA.

On the merits of the question presented, the FDCPA provisions at issue here do not apply to non-judicial foreclosure activity. That is because enforcing a security interest by initiating a non-judicial foreclosure proceeding does not involve the activity that triggers the FDCPA: collection of money to satisfy a debt. Moreover, interpreting the FDCPA's provisions governing debt collection to include non-judicial foreclosures would improperly stretch the statute to cover a variety of other activities that Congress plainly did not intend to reach.

1. Non-judicial foreclosure does not involve the collection of money.

To constitute "debt collection" for purposes of the FDCPA, non-judicial foreclosure would have to involve collection of a "debt," as that term is defined by the statute—and it does not.

The FDCPA defines "debt" as an "*obligation* * * * *to pay money* arising out of a transaction" for personal, family, or household purposes. 15 U.S.C. § 1692a(5) (emphasis added). But a non-judicial foreclosure does not collect on any "obligation * * * to pay money" on the part of the borrower. As respondent explains (Resp. Br. 16-17), the natural meaning of collecting on a borrower's obligation is to demand

payment *from the borrower*. And in a non-judicial foreclosure, no payment is demanded from the borrower.

Indeed, the collection of payment from the borrower generally is not possible in non-judicial foreclosure. In many non-judicial foreclosures, the property involved is held pursuant to a deed of trust—an alternative instrument that "involves a conveyance of the realty to a third person in trust to hold as security for the payment of the debt to the lender-noteholder." 1 Real Estate Finance Law § 1:6. Thus, although the borrower receives notice of his or her default and is responsible for curing it, nothing is obtained from the borrower; rather, "the trustee exercises the power of sale." *Id.* § 7:20.

And whether a property is held under a deed of trust or a mortgage, the money collected as a result of a non-judicial foreclosure sale is not paid by the *debtor*; it is paid by the *purchaser* of the foreclosed property. If the foreclosure sale proceeds do not exceed the borrower's balance, the lender may be able to collect the deficiency from the borrower, but this requires the lender to bring a *separate judicial* action against the borrower after the foreclosure sale.[14]

Nor is the collection of money from the borrower the goal of a lender that institutes foreclosure proceedings. By the time other loss mitigation methods have failed and a lender has commenced foreclosure, the lender has generally abandoned the hope that the borrower will repay the loan and is interested on-

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[14] See, *e.g.*, Pet. App. 8a (discussing Colorado law); 4 Powell on Real Property § 37.42[6]. A deficiency action *would* entail collection of a debt and be subject to the FDCPA, assuming that the other requirements of the statute were met.

ly in preventing further losses by selling the property.

Thus, the fact that the debtor's mortgage is satisfied—at least in part—through a sale resulting from a foreclosure does not imply that the foreclosure amounts to collecting on the *debtor's* "obligation to pay money" within the meaning of the FDCPA.

The FDCPA's definition of a "debt collector" confirms this reading of the statute. That definition provides that a "debt collector" is "any person * * * who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6). Then, two sentences later, the statute provides that, for purposes of one provision of the statute—Section 1692f(6)'s prohibition on improper threats to repossess property—the term "*also* includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests." *Ibid.* (emphasis added).

This expansion of the definition for only a limited purpose confirms that the generally-applicable definition of a debt collector in Section 1692a(6)'s first sentence does not encompass entities that enforce security interests. As this Court recently held, the term "also" is used to "add[]" to the entities covered by a statutory category in specified circumstances, "rather than clarify[]" the scope of that category. *Mt. Lemmon Fire Dist.* v. *Guido*, No. 17-587, slip op. at 4 (U.S. Nov. 6, 2018). If such entities *were* properly classified as debt collectors under the generic definition, there would be no need to specify that in certain circumstances, the definition "also" includes them.

Interpreting the statutory definition of debt collection to *exclude* non-judicial foreclosure is the only reading that is consistent with this Court's well-established obligation to "give effect, if possible, to every word Congress used." *Nat'l Ass'n of Mfrs.* v. *Dep't of Def.*, 138 S. Ct. 617, 632 (2018).

2. Petitioner's proposed definition of "debt collection" is unreasonably broad.

Petitioner asserts that any communication that *discusses* a debtor's obligations and their potential consequences constitutes "debt collection," even if there is no attempt to collect any money directly from the debtor. Pet. Br. 14-16. But that position is untenable.

Petitioner's definition would sweep in a variety of activities that have nothing to do with debt collection. For example, a lender might be held to have engaged in debt collection if it sent information about automatic payment options or alternate payment plans to a borrower who has missed a payment. Similarly, communications between a credit reporting company and a consumer about the consumer's debts might be covered if they were viewed as providing the consumer with an incentive to pay the debts.

Congress did not intend the FDCPA to encompass these sorts of benign communications: It was concerned with abusive and deceptive practices by "independent debt collectors"—such as "obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentation of a consumer's legal rights," or use of other false pretenses. S. Rep. 95-382, at 2 (1977). Applying FDCPA standards to these communications would discourage lenders from making them. That would deprive bor-

rowers of information that would assist them in being informed about, and prepared for, the harmful consequences that can arise out of difficulties with credit. And lenders, faced with a lower likelihood of loss mitigation due to the chilling effect on their communications with borrowers, would be compelled to increase the cost of credit.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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NOVEMBER 2018

No. 17-1307

IN THE

Supreme Court of the United States

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Petitioner,

v.

MCCARTHY & HOLTHUS, LLP, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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INTEREST OF *AMICUS CURIAE*[1]

The NAACP Legal Defense & Educational Fund, Inc. ("LDF") is the nation's first and foremost civil rights legal organization. Through litigation, advocacy, public education, and outreach, LDF strives to secure equal justice under the law for all Americans, and to break down barriers that prevent African Americans from realizing their basic civil and human rights.

Throughout its history, LDF has challenged policies that deny housing opportunities to African Americans. *See, e.g.*, *McGhee v. Sipes*, 334 U.S. 1 (1948) (companion case to *Shelley v. Kraemer*, 334 U.S. 1 (1948)) (racially restrictive covenants); *Cent. Ala. Fair Hous. Ctr., Inc. v. Lowder Realty Co.*, 236 F.3d 629 (11th Cir. 2000) (racial steering); *Comer v. Cisneros*, 37 F.3d 775 (2d Cir. 1994) (racial discrimination in public housing and assistance programs); *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992) (redlining); *Kennedy Park Homes Ass'n, Inc. v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970) (exclusionary zoning); *Thompson v. U.S. Dep't of Hous. & Urb. Dev.*, 2006 WL 581260 (D. Md. Jan. 10, 2006) (federal government's obligation to affirmatively further fair housing); Consent Decree, *Byrd v. First*

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part and that no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

Real Estate Corp. of Ala., No. 95-CV-3087 (N.D. Ala. May 14, 1998) (racial steering); Complaint, *Morningside, et al. v. Sabree, et al.*, No, 16-8807-CH (Mich. Cir. Ct., July 13, 2016) (discriminatory foreclosures).

LDF has also advocated for the fair and comprehensive interpretation and application of the Fair Housing Act of 1968, 42 U.S.C. § 3605, *see Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507 (2015); *see also* NAACP Legal Def. & Educ. Fund, Inc., *et al.*, *The Future of Fair Housing: Report on the National Commission of Fair Housing and Equal Opportunity* (Dec. 2008), and for protections for African American communities from discriminatory and unfair foreclosure-related practices, *see* Brief of Amicus Curiae NAACP Legal Def. & Educ. Fund, Inc., *Bank of America Corp. v. City of Miami*, No. 15-1111 (U.S. May 1, 2017).

INTRODUCTION AND SUMMARY OF ARGUMENT

The Fair Debt Collection Practices Act ("FDCPA") protects borrowers from a broad range of deceptive, unfair and abusive debt collection practices across all sectors of consumer finance. In passing the law, Congress recognized that such practices can have drastic effects on borrowers, including personal bankruptcy, marital instability, and job loss. 15 U.S.C. § 1692(a). These negative effects are especially pronounced when debt collection threatens a person's home.[2]

Mortgage debt is the primary form of debt held by American consumers, and the FDCPA protects borrowers from unfair, abusive, and deceptive practices when lenders' agents seek to collect that debt through any type of foreclosure proceeding. This conclusion is compelled by the language and purpose of the law, and it is in line with American legal traditions recognizing the need for particular attention to fairness when a person's home is at risk.

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[2] *See, e.g.*, G. Thomas Kingsley, Robin Smith & David Price, *The Impacts of Foreclosures on Families and Communities*, URBAN INST., 11–12 (May 2009), https://www.urban.org/sites/default/files/publication/30426/411909-The-Impacts-of-Foreclosures-on-Families-and-Communities.PDF (noting that foreclosures may make families more vulnerable to marital instability and missed employment); Alexander C. Tsai, *Home Foreclosure, Health, and Mental Health: A Systematic Review of Individual, Aggregate, and Contextual Associations*, PLOS ONE (Apr. 7, 2015), https://doi.org/10.1371/journal.pone.0123182 (finding that home foreclosure adversely affects health and mental health).

The sanctity of the home, and the encouragement and protection of homeownership, has been a bedrock principle of American law dating back even before the Constitution.

Most states allow "nonjudicial" foreclosures, which are conducted outside the oversight of a court and usually through a series of notices published and mailed to borrowers. As in foreclosures generally, the mortgage servicer ordinarily delegates to a third party—often attorneys—the responsibility for initiating, managing, and completing the foreclosure process against a borrower. In nonjudicial foreclosures, however, the foreclosing party does not have to prove its case to a court. Instead, after the notices are sent to the borrower via mail, the property is sold at public auction without a forum in which the borrower may make objections. If there are defects in the process, the borrower herself must find them, document them, and often must file an affirmative lawsuit to challenge the foreclosure. Many actions to enjoin nonjudicial foreclosures face onerous procedural barriers, such as requirements to post a bond before an injunction to stop the foreclosure can be granted.[3] Nonjudicial foreclosures are generally

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[3] *See, e.g.*, FED. R. CIV. P. 65(c); *Frizzell v. Murray*, 313 P.3d 1171, 1172 (Wash. 2013) (holding that borrower's failure to post $25,000 bond waived her claims in an action to enjoin a nonjudicial foreclosure); *Ferguson v. Commercial Bank*, 578 So. 2d 1234, 1235 (Ala. 1991) (noting that borrowers' attempt to stop a nonjudicial foreclosure sale was dismissed when they failed to pay a $30,000 bond).

faster than judicial foreclosures, and foreclosure rates in states with nonjudicial foreclosure are significantly higher than in states that permit only judicial foreclosure.[4]

Foreclosing parties regularly take advantage of this lack of judicial oversight, misleading borrowers about who owns their loan, misstating amounts owed, inflating fees, and sometimes proceeding with foreclosure even after borrowers have made outstanding payments.[5] These practices represent precisely the kind of conduct Congress sought to address by empowering borrowers with a uniform federal cause of action in the FDCPA. It would therefore lead to a perverse result if the FDCPA applied to judicial foreclosure proceedings, but not to nonjudicial proceedings.

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[4] *See* Atif Mian, Amir Sufi & Francesco Trebbi, *Foreclosures, House Prices, and the Real Economy*, Kreisman Working Papers Series in Housing Law and Policy, No. 6 (2014) (finding that lenders are twice as likely to foreclose on delinquent homeowners in nonjudicial states controlling for income, credit score, and education levels).

[5] *See, e.g.*, LOU PIZANTE, ET AL., OFF. OF THE ASSESSOR-RECORDER, SAN FRANCISCO, FORECLOSURE IN CALIFORNIA: A CRISIS IN COMPLIANCE 1 (2012), http://aequitasaudit.com/images/aequitas_sf_report.pdf (finding that 84% of nonjudicial foreclosure documents recorded in San Francisco County from 2009–2011 contained "clear violations of law"); John Campbell, *Can We Trust Trustees? Proposals for Reducing Wrongful Foreclosures*, 63 CATH. U. L. REV. 103, 114–16 (2013) (collecting examples of wrongful foreclosures, including where borrowers had not taken out a loan at all, and where borrowers had made all required payments).

The prevalence of foreclosures, and the abusive practices that accompany them, disproportionately affect communities of color. African American borrowers were far more likely to be foreclosed upon during the foreclosure crisis, lost more relative wealth than any other group during that crisis, and have seen less recovery since. African American borrowers, regardless of education and income, are more likely to receive risky mortgages and more likely to experience foreclosure. Communities of color also suffer from depressed property values as a result. Exempting nonjudicial foreclosures from the FDCPA's protections would leave borrowers of color—who already face other types of housing-related discrimination—particularly vulnerable.

ARGUMENT

In 1977, Congress recognized that "[a]busive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." 15 U.S.C. § 1692(a). In response, Congress enacted the Fair Debt Collection Practices Act (FDCPA) to "eliminate" those practices and their deleterious effects. *Id.* § 1692(e). The Act limits what debt collectors may do when they engage in the "collection of [a] debt." 15 U.S.C. § 1692g(a). And Congress ensured that the FDCPA would have a broad sweep by defining "debt" broadly: "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are

primarily for personal, family, or household purposes[.]" 15 U.S.C. § 1692a(5). Congress further ensured that the Act would reach a wide range of unfair debt collection practices by defining "debt collector" as, inter alia, "any person who . . . regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." *Id.* § 1692a(6).

Petitioner is correct that a nonjudicial foreclosure is the collection of a debt, because it seeks satisfaction of the promise or obligation embodied in the mortgage agreement. That conclusion is clear from the plain text of the FDCPA, as well as the context and purpose of the law. It is confirmed by the particular importance of homeownership in the American legal tradition, and by the need to ensure that homeowners of color in particular have tools to address abusive practices.

I. NONJUDICIAL FORECLOSURE IS DEBT COLLECTION ACCORDING TO THE PLAIN MEANING OF THE FDCPA.

The FDCPA applies to nonjudicial foreclosure proceedings because, under the plain text of the statute, they constitute a form of debt collection. Nonjudicial foreclosure proceedings concern a "debt," which, under the FDCPA, is the "*obligation* . . . to pay money . . . ." 15 U.S.C. § 1692a(5) (emphasis added), and is *not* "synonymous with 'money,'" *Obduskey v. Wells Fargo*, 879 F.3d 1216, 1221 (10th Cir. 2018). Nonjudicial foreclosure seeks to satisfy this obligation by taking possession of the property. And foreclosing parties in nonjudicial foreclosures are "debt collectors"

under the FDCPA because the statute defines that term to include any person who regularly "collects, or attempts to collect, directly *or indirectly*, debts owed or due . . . another." 15 U.S.C. § 1692(a)(6) (emphasis added).

A. Nonjudicial Foreclosure Proceedings Are Designed to Collect on an "Obligation . . . to Pay."

The obligation to pay money is the central feature in any mortgage transaction. A mortgage secures an obligation to pay money with a security interest in property.[6] Where there is no obligation to pay, there is no security interest in the property.[7]

The obligation to pay money is also, therefore, central to any foreclosure. Black's Law Dictionary defines "foreclosure" as "[a] legal proceeding to terminate a mortgagor's interest in property, instituted by the lender (the mortgagee) either to gain title or to force a sale *in order to satisfy the unpaid debt secured by the property*."[8] All foreclosures, judicial and nonjudicial, are mechanisms to satisfy unpaid debts: where there is no debt, there can be no foreclosure. The obligation embedded in the mortgage both mandates

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[6] *See Mortgage*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("1. A conveyance of title to property that is given as security for the payment of a debt[.]").

[7] *See* RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 6.4 (1997) ("[P]erformance in full of the obligation secured by a mortgage . . . redeems the real estate from the mortgage . . . and extinguishes the mortgage.")

[8] *Foreclosure*, BLACK'S LAW DICTIONARY (10th ed. 2014) (emphasis added).

payment and authorizes the seizure and sale of property *if* the debt is not paid as the mortgage directs, and that seizure and sale of property *satisfies the debt* according to the property's value and the underlying state law.

In the decision below, the Tenth Circuit failed to consider key words in the text of the FDCPA, and these basic principles of property law. The Tenth Circuit held that "debt" under the FDCPA is "synonymous with money," and that enforcing a security interest "is not an attempt to collect money from the debtor," as "the consumer has no obligation . . . to pay money." *Obduskey*, 879 F.3d at 1221 (internal quotation marks omitted).

But consumers in foreclosure proceedings—whether judicial or nonjudicial—*do* have an obligation to pay money. That obligation is a necessary condition for the enforcement of the security interest. Here, for example, Respondent could not foreclose on Petitioner if Petitioner paid the debt in full before the foreclosure. Depending on the value of the security interest and the underlying state law, this enforcement may satisfy the consumer's monetary obligation in whole, in part, or with a surplus that must be repaid to the consumer. The entire foreclosure process relies upon and revolves around the consumer's *obligation* to pay a sum of money. The foreclosure process is therefore collection of a "debt" within the meaning of the FDCPA.

B. Nonjudicial Foreclosure Attorneys Collect Debt "Directly or Indirectly."

The Tenth Circuit also suggested that Respondents are not debt collectors because, under Colorado law, a public trustee ultimately sells the property and transfers payment to the mortgagee. *Obduskey*, 879 F.3d at 1221, n.4. But the FDCPA defines a "debt collector" as any person who "regularly collects . . . *directly or indirectly*, debts owed or due . . . another." 15 U.S.C. § 1692a(6) (emphasis added). As attorneys engaging in nonjudicial foreclosure activity, Respondents can be deemed to collect debt "directly" under this definition, because they institute legal actions where the intended remedy (seizure and sale of the borrower's home) will satisfy the borrower's obligation to pay. Indeed, Respondent McCarthy's communications with Petitioner indicate as much. Its initial letter stated that McCarthy "may be considered a debt collector attempting to collect a debt" and that "any information obtained will be used for that purpose." J.A. 37. Among other things, the letter informed Petitioner of "the total amount of the debt currently owed" and informed him that McCarthy "w[ould] assume this debt to be valid unless [Petitioner] dispute[d] its validity, or any part of it, within 30 days[.]" *Id.*

But even if they are not collecting directly, Respondents are certainly collecting *indirectly*. They are undertaking actions intended to enforce a security interest in the borrower's home in order to satisfy the borrower's obligation to pay. Nonjudicial foreclosure

attorneys are therefore "debt collectors," under the text of the FDCPA.

II. THE FDCPA'S PURPOSES CONFIRM THAT THE STATUTE APPLIES TO NONJUDICIAL FORECLOSURE PROCEEDINGS.

Congress enacted the FDCPA to protect consumers from the adverse consequences of abusive and deceptive debt collection practices, and to ensure that there is a uniform nationwide remedy against such practices. The decision below would create an "enormous loophole" in the FDCPA, *Wilson v. Draper & Goldberg, PLLC*, 443 F.3d 373, 376 (4th Cir. 2006), and therefore frustrate both purposes.

In passing the FDCPA, Congress found that "[t]here is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." 15 U.S.C. § 1692(a). In addition to addressing these devastating effects on borrowers, Congress sought to "promote consistent State action to protect consumers against debt collection abuses." *Id.* § 1692(e).

The risks of abusive debt collection are particularly prevalent with respect to collection of the principal type of debt in this country: mortgage debt. As of the second quarter of 2018, mortgages constitute more than two thirds of all consumer debt in the United States—i.e. more than twice as much as all

other types of consumer debt combined.[9] There are more than 75 million mortgage accounts in the United states.[10] Although foreclosures have been declining since recession-level highs, 1.1% of mortgages, i.e. more than 750,000 borrowers, are "seriously delinquent" as of August 2018,[11] and more than 675,000 borrowers found themselves in the foreclosure process in 2017.[12] The effect of foreclosures is compounded in the African American community in particular by other practices that target or disproportionately affect African American homeowners, including discriminatory targeting for predatory loans,[13] discriminatory property tax and water lien foreclosure practices,[14] and

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[9] *See* FED. RESERVE BANK OF NEW YORK, QUARTERLY REPORT ON HOUSEHOLD DEBT AND CREDIT 2018:Q2, 3 (Aug. 2018), https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC_2018Q2.pdf.

[10] *Id.* at 4.

[11] *Id.* at Summary.

[12] ATTOM DATA SOLS., U.S. FORECLOSURE ACTIVITY DROPS TO 12-YEAR LOW IN 2017, (Jan. 16, 2018), https://www.attomdata.com/news/foreclosure-trends/2017-year-end-u-s-foreclosure-market-report/ (finding 676,535 U.S. homes with foreclosure filings in 2017).

[13] *See infra* Section IV.

[14] *See, e.g.* Michael Sallah, Debra Cenziper & Steven Rich, *Left with Nothing*, WASH. POST (Sept. 8, 2013), http://www.washingtonpost.com/sf/investigative/2013/09/08/left-with-nothing/ (finding hundreds of homeowners in primarily minority neighborhoods in Washington D.C. lose their homes to tax foreclosure over amounts as small as $134); Fred Schulte & June Arney, *Small Unpaid Bills Put Residents at Risk*, BALT. SUN (Mar. 25, 2007), http://www.baltimoresun.com/bal-

disproportionate neglect of bank-owned properties, which devalues surrounding properties in predominantly African American neighborhoods.[15] If the decision below is affirmed, the FDCPA would not apply to the most common type of foreclosure proceedings in over half the states, thereby seriously undermining Congress's purpose of protecting consumers from abusive and deceptive debt collection practices.

Congress also enacted the FDCPA to apply consistent protections for borrowers in different states. 15 U.S.C. § 1692(e). Here, too, Respondent's interpretation would frustrate Congress's purpose.

In the decision below, the Tenth Circuit exempted only nonjudicial foreclosures from the FDCPA, noting that "*judicial* mortgage foreclosures may be covered under the FDCPA[.]" *Obduskey*, 879 F.3d at 1221. This is consistent with decisions by other Circuits, which have held judicial foreclosures subject to FDCPA claims,[16] and, more generally, with this Court's

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te.bz.waterbills25mar25-story.html# (finding hundreds of Baltimore residents lose their homes due to unpaid water bills, half of which are $500 or less).

[15] *See* NAT'L FAIR HOUS. ALLIANCE, ZIP CODE INEQUALITY: DISCRIMINATION BY BANKS IN THE MAINTENANCE OF HOMES IN NEIGHBORHOODS OF COLOR (Aug. 27, 2014), https://nationalfairhousing.org/wp-content/uploads/2017/04/2014-08-27_NFHA_REO_report.pdf (finding that banks often fail to maintain real estate owned properties in communities of color).

[16] *See, e.g. McNair v. Maxwell & Morgan PC*, 893 F.3d 680, 683 (9th Cir. 2018) (holding that attorneys pursuing judicial

precedent regarding FDCPA applicability to litigation. *See Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 578–79 (2010); *Heintz v. Jenkins*, 514 U.S. 291, 299 (1995). No Circuit has held that the FDCPA does not apply to judicial foreclosures.

But applying the FDCPA to judicial foreclosures, but not nonjudicial foreclosures, would create precisely the patchwork Congress was seeking to avoid through the uniform FDCPA. And it would do so in a particularly anomalous fashion: the FDCPA would protect borrowers who already have more protection from, and recourse for, abusive practices by virtue of being a party to a judicial proceeding. Borrowers who face unfair, abusive, or deceptive practices in nonjudicial foreclosures, by contrast, would be denied a federal cause of action to redress the same kinds of harms, even though they already have fewer protections given the lack of judicial oversight.

Indeed, evidence indicates that the deceptive and abusive practices Congress sought to address through the FDCPA are common in nonjudicial foreclosure

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foreclosure are covered by the FDCPA); *Glazer v. Chase Home Fin. LLC*, 704 F.3d 453, 461 (6th Cir. 2013) (holding that judicial foreclosure is debt collection under the FDCPA and stating that "[i]n fact, *every* mortgage foreclosure, judicial or otherwise, is undertaken for the very purpose of obtaining payment on the underlying debt"); *Kaltenbach v. Richards*, 464 F.3d 524, 529 (5th Cir. 2006) (holding that "a party who satisfies § 1692a(6)'s general definition of a 'debt collector' is a debt collector for the purposes of the entire FDCPA even when enforcing security interests").

proceedings. Sections 1692e and 1692g of the FDCPA protect borrowers from misrepresentations about the amount or character of a debt, and from attempts to collect amounts not authorized by the underlying agreement. But a 2008 study in Texas found that nonjudicial foreclosure filings in that state routinely inflated charges and misrepresented amounts owed.[17] These abuses were only remedied because the borrowers in this study declared bankruptcy—for countless others they went unaddressed. The *amicus curiae* brief of the National Consumer Law Center provides many more instructive examples. *See* Br. of Amicus Curiae National Consumer Law Center at Section IV.

Similarly, Sections 1692e and 1692g protect borrowers from threats of action that cannot legally be taken, and from foreclosures by parties who have no right to possession. But a 2012 study of nonjudicial foreclosure filings in San Francisco County showed that foreclosing entities often use nonjudicial foreclosure to strip people of their homes despite having no legal right to the property.[18]

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[17] Katherine Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, 87 TEX. L. REV. 121 (2008).

[18] *See* PIZANTE, *supra* note 5, at 1 (finding that 84% of nonjudicial foreclosure documents recorded in San Francisco County from 2009–2011 contained "clear violations of law"). *See also* Timothy A. Froehle, *Standing in the Wake of the Foreclosure Crisis: Why Procedural Requirements Are Necessary to Prevent Further Loss to Homeowners*, 96 IOWA L. REV. 1719, 1738–40 (2011) (describing examples of parties foreclosing without proper ownership of the underlying mortgage).

Borrowers going through foreclosure with judicial oversight are less vulnerable to these abusive practices. Foreclosing parties must file documents in court sufficient to show the truth of the amounts they claim borrowers owe, and sufficient to show that they may legally foreclose, consistent with pleading and evidence rules in state courts. But borrowers in nonjudicial foreclosure proceedings have no comparable access to this information, and no already-assigned judge to ask for relief from abuse. Borrowers in nonjudicial foreclosures are therefore more vulnerable to these abusive collection practices, and more in need of the protections of the FDCPA.

Mortgages are often the most important and most complicated transactions consumers enter in their lives. Sorting out available options when a mortgage payment is impossible to make is no small undertaking. Borrowers must document their own finances accurately and repeatedly, explore the possibility of refinances, modifications, and short sales, and determine their legal rights simultaneously. FDCPA application in the nonjudicial foreclosure process provides an incentive for foreclosing parties to provide accurate, understandable information on which consumers can rely. And this application also accomplishes Congress's goal of uniformity and consistency in consumer protection from debt collection abuses nationwide.

III. THE FDCPA'S APPLICATION TO NONJUDICIAL FORECLOSURES IS CONSISTENT WITH THE SOLICITUDE FOR HOMEOWERS IN OUR LEGAL TRADITION.

Our constitutional and common-law tradition give the home the highest solicitude in a host of areas.

Long before the Founding, Anglo-American law prized the importance and indeed sanctity of the home. In 1604, *Semayne's Case* held that "the house of every one is to him as his [] castle and fortress, as well for his defence against injury and violence, as for his repose[.]" 77 Eng. Rep. 194, 195 (K.B.). A century and a half later, Blackstone observed that English law had "so particular and tender a regard to the immunity of a man's house that it styles it his castle and will never suffer it to be violated with impunity[.]" 4 William Blackstone, *Commentaries on the Laws of England* 223 (Phila., J.B. Lippincott Co., 1893). Indeed, Blackstone recognized this principle as predating positive law. Discussing the origin of property in "house and home-stall," he noted that even animals "maintain[] a kind of permanent property in their dwellings, especially for the protection of their young . . . the invasion of which they esteemed a very flagrant injustice[.]" 2 William Blackstone, *Commentaries on the Laws of England* 4 (Phila., J.B. Lippincott Co., 1893); *see also* 4 Blackstone, *supra*, at 222 (observing that the "right of habitation" could be acquired "even in a state of nature").

The Founders were aware of, and relied upon, this legacy, even before the Founding. So, for example,

John Adams could argue with confidence in 1774 that "[a]n Englishmans dwelling House is his Castle. . . . every Member of Society has entered into a solemn Covenant with every other that he shall enjoy in his own dwelling House as compleat a security, safety and Peace and Tranquility as if it was surrounded with Walls of Brass, with Ramparts and Palisadoes and defended with a Garrison and Artillery[.]" Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 642 n.260 (1999) (quoting 1 *Legal Papers of John Adams* 137 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965)).

The Bill of Rights reflected their understanding. As Justice Joseph Story explained in his influential *Commentaries on the Constitution of the United States*, the Third Amendment's bar on the quartering of soldiers in homes aimed "to secure the perfect enjoyment of that great right of the common law, that a man's house shall be his own castle, privileged against all civil and military intrusion." 3 Joseph Story, *Commentaries on the Constitution of the United States* 747 (Bos., Hilliard, Gray & Co. 1833). And the Fourth Amendment, with its explicit protection of "houses," was in Story's view "the affirmance of a great constitutional doctrine of the common law." *Id.* at 748; *see also* Davies, *supra*, at 603, 608 (discussing the relevance of the house's "special status at common law" to the Framers).

Consistent with this history, this Court has deemed the home "first among equals" for Fourth Amendment purposes. *Florida v. Jardines*, 569 U.S. 1,

6 (2013); *see also Payton v. New York*, 445 U.S. 573, 597 n.45 (1980) ("[O]ne of the most essential branches of English liberty is the freedom of one's house.") (quoting 2 *Legal Papers of John Adams* 142 (L. Kinvin Wroth & Hiller B. Zobel eds. 1965))). Because we have "lived our whole national history with an understanding of the ancient adage that a man's house is his castle," one occupant's consent for the police to enter and search is invalid if a present co-occupant objects. *Georgia v. Randolph*, 547 U.S. 103, 115 (2006) (internal quotation marks omitted). To preserve that sanctity, the Court recognizes a prophylactic protection for the area "immediately surrounding and associated with the home," *Jardines*, 569 U.S. at 6, and has held that employing thermal imaging from a public street to detect heat levels within the home must satisfy Fourth Amendment scrutiny, *see Kyllo v. United States*, 533 U.S. 27, 29, 40 (2001).

Moreover, this Court has considered the special importance of the home in interpreting constitutional protections that do not specifically mention it. For example, in the Second Amendment context, *District of Columbia v. Heller* emphasized that the Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." 554 U.S. 570, 635 (2008). And, invalidating a ban on same-sex intimate conduct as violating the liberty protected by the Fourteenth Amendment, this Court in *Lawrence v. Texas* recognized that "[i]n our tradition the State is

not omnipresent in the home." 539 U.S. 558, 562 (2003).

This Court's treatment of the home in *Jones v. Flowers*, 547 U.S. 220 (2006), is particularly notable here. Settled Fourteenth Amendment due-process law required notice and opportunity for a hearing "[b]efore a State [could] take property and sell it for unpaid taxes[.]" *Id.* at 223. The question in *Flowers* was whether the government could seize a homeowner's property based on nothing more than the undelivered return of a notice of tax sale mailed to the owner. *See id.* The nature of the process due "varies according to specific factual contexts[,]" *Hannah v. Larche*, 363 U.S. 420, 442 (1960), and the linchpin in *Flowers* was the home. In holding that more process was constitutionally required, the Court in *Flowers* emphasized repeatedly that the petitioner's home was at stake. *See, e.g.*, *Flowers*, 547 U.S. at 229 (stating that at issue was "the adequacy of notice prior to the State extinguishing a property owner's interest in a home"); *id.* at 238 ("[S]omeone who actually wanted to alert Jones that he was in danger of losing his house would do more[.]"); *id.* at 239 ("In this case, the State is exerting extraordinary power against a property owner—taking and selling a house he owns.").

In short, it does not overstate the matter to call the home "the most constitutionally protected place on earth." *United States v. Craighead*, 539 F.3d 1073, 1083 (9th Cir. 2008). As this Court has recognized, the "interest in protecting the well-being, tranquility, and privacy of the home" is "of the highest order in a free

and civilized society." *Carey v. Brown*, 447 U.S. 455, 471 (1980).

Consistent with this legal tradition, the home has been uniquely linked to the idea of the "American dream."[19] Both before and after slavery—despite antebellum bars on property ownership and postbellum barriers to its acquisition—African Americans sought to be part of this tradition.[20] Similarly, for successive generations of new Americans, a home of their own has been a central, driving ambition and a marker of self-sufficiency and accomplishment.[21]

For these reasons, a long line of Congresses before the 95th Congress—which enacted the FDCPA—recognized the home's importance. For example, the

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[19] *See* Heather K. Way, *Informal Homeownership in the United States and the Law*, 29 ST. LOUIS U. PUB. L. REV. 113, 126 (2009); President Barack Obama, Remarks by the President on Responsible Homeownership (Aug. 6, 2013), https://obamawhitehouse.archives.gov/the-press-office/2013/08/06/remarks-president-responsible-homeownership (describing "the chance to own your own home" as "the most tangible cornerstone that lies at the heart of the American dream").

[20] *See, e.g.*, Charles Lewis Nier III, *The Shadow of Credit: The Historical Origins of Racial Predatory Lending and Its Impact Upon African American Wealth Accumulation*, 11 U. PA. J.L. & SOC. CHANGE 131, 135–37, 143, 148, 167–69 (2008) (discussing relevant history).

[21] *See* Charu A. Chandrasekhar, *Can New Americans Achieve the American Dream? Promoting Homeownership in Immigrant Communities*, 39 HARV. C.R.-C.L. L. REV. 169, 170–172 (2004) (collecting studies).

National Housing Act, Pub. L. No. 73-479, 48 Stat. 1246 (1934), created the Federal Housing Administration to "address a crisis in mortgage delinquencies and foreclosures[.]"[22] And the Housing Act of 1949, Pub. L. No. 81-171, 63 Stat. 413, declared Congress's "goal of a decent home and a suitable living environment for every American family" to "advance[] . . . the growth, wealth, and security of the Nation." 42 U.S.C. § 1441. We had, in short, "[d]ecades of federal policy designed to expand and improve the nation's housing supply[.]"[23]

Of course, as this Court recently recognized, African Americans and other minorities were in large part excluded—sometimes by government action—from this housing policy. *See, e.g., Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2515–16 (2015); *see also* Brief of Amici Curiae Housing Scholars Supporting Respondent, *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507 (2015) (No. 13-1371), 2014 WL 7405732, at *10–21 (discussing this history). These exclusionary practices often relegated African Americans to substandard, exploitative housing. For example, the Federal Housing Administration intentionally imposed racially restrictive covenants

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[22] Brad Greenburg, *Consolidation After Crisis: How a Few Private Investors Bought Distressed, Federally-Insured Mortgages After the Foreclosure Crisis*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 887, 890 (2017) (internal quotation marks omitted).

[23] Lawrence B. Simons, *Towards a New National Housing Policy*, 6 YALE L. & POL'Y REV. 259, 264 (1988).

and "redlined" African American families into blocks ineligible for Federal Housing Administration insured mortgages.[24] Seeking to eliminate these and other injustices, Congress passed the Fair Housing Act, which aimed to create "truly integrated and balanced living patterns." *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (citation omitted). As one of our most significant civil rights statutes, the Fair Housing Act represents our recognition that the promise of security, stability, and full citizenship that a home represents must be available to all Americans.

This history and context should illuminate the question presented here. Given our long history of granting the home pride of place, there can be no serious dispute that the 95th Congress understood the home's importance. Nor can it be doubted that Congress knew that mortgages were a form of debt that can be collected upon. After all, the Senate Report explicitly recognizes that they are. In explaining why "persons who originated" loans could collect on those debts without being considered debt collectors, Congress gave "*mortgages* and student loans" as examples of collectible debts. S. Rep. No. 95-382, at 3 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1695, 1698 (emphasis added).

And, finally, it was clear in 1977, as it is today, that mortgages were a significant form of debt. In the

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[24] *See, e.g.*, David Reiss, *Underwriting Sustainable Homeownership: The Federal Housing Administration and the Low Down Payment Loan*, 50 GA. L. REV. 1019, 1050–51 (2016).

thirty years between 1949 and 1979, mortgage debt rose: from 20 percent of total American household income to 46 percent of household income, from 15 percent of household assets to 28 percent of household assets, and from just over ten percent of GDP to just under thirty percent of GDP.[25] It would have been strange indeed had Congress drafted a statute focused on curbing abusive debt collection practices that exempted an enormous amount of American household debt relating to one of the most prized possessions in American thought and law—the home. It did not.

IV. THE DECISION BELOW CREATES PARTICULAR RISKS FOR AFRICAN AMERICAN HOMEWONERS.

In the years following the Second World War, federal, state, and local governments enforced and subsidized discriminatory policies that prevented Black families from acquiring homes.[26] Federal agencies initiated the practice of redlining,[27] and the Federal Housing Administration required developers to include racially restrictive covenants in their deeds

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[25] *See* Richard K. Green & Susan M. Wachter, *The American Mortgage in Historical and International Context*, 19 J. OF ECON. PERSP. 93, 93–94 (2005).

[26] **See generally**, DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993).

[27] Benjamin Howell, *Exploiting Race and Space: Concentrated Subprime Lending as Housing Discrimination*, 94 CALIF. L. REV. 101, 107–08 (2006).

to obtain federal financing.[28] This combination of racially discriminatory government policies and private sector prejudice prevented many Black people from owning homes, and "segregation continued unabated" through the early 1960s.[29] While the overall homeownership rate in the United States increased from 43.6 percent in 1940 to 62 percent in 1960, that increase inured exclusively to the benefit of the white middle class.[30] The resultant "residential spatial segregation in America's cities has contributed to the growth of an African-American underclass that threatens to make urban poverty and racial injustice a permanent fixture of American society."[31]

More recently, a number of major lenders developed and aggressively pushed forms of "reverse redlining." They did so by marketing high-risk, subprime loans, "offering easier and faster approvals" to borrowers of color while downplaying the exorbitant costs that would later be exacted through inflatable interest rates, balloon payments, negative amortization features, and/or stricter repayment

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[28] *See* Richard Rothstein, *Race and Public Housing: Revisiting the Federal Role*, 21 POVERTY & RACE RES. ACTION COUNCIL 2 (Nov.–Dec. 2012).

[29] Ira Rheingold, *et al.*, *From Redlining to Reverse Redlining: A History of Obstacles for Minority Homeownership in America*, 34 CLEARINGHOUSE REV. 642, 645 (2001).

[30] MECHELE DICKERSON, HOME OWNERSHIP AND AMERICA'S FINANCIAL UNDERCLASS: FLAWED PREMISES, BROKEN PROMISES, NEW PRESCRIPTIONS 181 (Cambridge Univ. Press 2014).

[31] John P. Relman, *Foreclosures, Integration, and the Future of the Fair Housing Act*, 41 IND. L. REV. 629, 629, 641 (2008).

terms.[32] Studies that control for income, credit score, and other risk variables consistently show that borrowers of color were and continue to be disproportionately steered into predatory high-risk loans.[33]

Given this historical and contemporary discrimination in the housing market, it is no surprise that Black borrowers fared significantly worse than others during and since the foreclosure crisis. "[T]he group with the smallest percentage of homeownership, African Americans, had the greatest dive in homeownership rates."[34] Indeed, a study examining foreclosures during the housing crisis found that predominantly Black neighborhoods experienced 8.1 foreclosures per 100 homes, while predominantly

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[32] *See* Rick Brooks & Ruth Simon, *Subprime Debacle Traps Even Very Credit-Worthy*, WALL STREET J. (Dec. 3, 2007), https://www.wsj.com/articles/SB119662974358911035.

[33] *See, e.g.*, Robert G. Schwemm & Jeffrey L. Taren, *Discretionary Pricing, Mortgage Discrimination, and the Fair Housing Act*, 45 HARV. C.R.-C.L. L. REV. 375, 399–400 (2010); Carolina Reid & Elizabeth Laderman, *The Untold Costs of Subprime Lending: Examining the Links among Higher-Priced Lending, Foreclosures and Race in California* 7, INST. FOR ASSETS & SOC. POL'Y, BRANDEIS UNIV. (2009); MONIQUE W. MORRIS, NAACP, DISCRIMINATION AND MORTGAGE LENDING IN AMERICA: A SUMMARY OF THE DISPARATE IMPACT OF SUBPRIME MORTGAGE LENDING ON AFRICAN AMERICANS (Mar. 2009), https://naacp.3cdn.net/4ca760b774f81317c4_klm6i6yxg.pdf.

[34] Aleatra P. Williams, *Lending Discrimination, the Foreclosure Crisis and the Perpetuation of Racial and Ethnic Disparities in Homeownership in the U.S.*, 6 WM. & MARY BUS. L. REV. 601, 618 (2015).

white neighborhoods experienced only 2.3 homes per 100 on average.[35]

The implications for wealth accumulation in the Black community have been devastating. Homeownership is strongly linked to wealth accumulation, due in large part to the transferability of real estate between generations.[36] The decades of federal policies and private discriminatory practices expanding white homeownership and restricting Black homeownership steadily widened the racial wealth gap through the 20th century.[37] The great recession and foreclosure crisis exacerbated this trend:

> [B]etween 2005 and 2009, fully two-thirds of median household wealth in [communities of color] was wiped out. From Jamaica, Queens, New York, to Oakland, California, strong, middle class African American neighborhoods saw nearly two decades of gains reversed in a matter of not years – but months.[38]

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[35] Matthew Hall, Kyle Crowder & Amy Spring, *Neighborhood Foreclosures, Racial/Ethnic Transitions, and Residential Segregation*, 80 AM. SOC. REV. 526, 534 (2015) (examining the years 2005–2009). .

[36] Lynnise E. Phillips Pantin, *The Wealth Gap and the Racial Disparities in the Startup Ecosystem*, 62 ST. LOUIS U. L.J. 419, 436 (2018).

[37] *See id.*; Thomas M. Shapiro, *Race, Homeownership and Wealth*, 20 WASH. U. J.L. & POL'Y 53, 58–59 (2006).

[38] Shaun Donovan, *Prepared Remarks of Secretary Shaun Donovan During the Countrywide Settlement Press Conference*, U.S. DEP'T OF HOUS. & URBAN DEV., PRESS ROOM (Dec. 21, 2011),

This dramatic and disproportionate decline in household wealth also reflects the fact that home equity "represents a much larger share of the net worth of the typical black or Hispanic homeowner (58 percent) than of the typical white homeowner (37 percent)."[39] The downstream effects of the foreclosure crisis, particularly decreased property values and depressed credit scores, likewise disproportionately harm Black families and communities of color.[40]

These downstream effects also restrict Black families' options for preventing foreclosure. Black families are less likely to qualify for refinancing due to disproportionately high loan balances, low property values, and weak credit scores. For these same

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https://archives.hud.gov/remarks/donovan/speeches/2011-12-21.cfm. *See also* Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis*, 75 AM. SOC. REV. 629, 633 (2010) ("[S]egregation and the new face of unequal lending combined to undermine black residential stability and erode any accumulated wealth.").

[39] JOINT CTR. FOR HOUS. STUDIES, HARV. UNIV., THE STATE OF THE NATION'S HOUSING: 2015 17 (2015), http://www.jchs.harvard.edu/sites/default/files/jchs-sonhr-2015-full.pdf.

[40] *See e.g.*, Ylan Q. Mui, *For Black Americans, Financial Damage from Subprime Explosion Is Likely to Last*, WASH. POST (July 8, 2012), https://www.washingtonpost.com/business/economy/for-black-americans-financial-damage-from-subprime-implosion-is-likely-to-last/2012/07/08/gJQAwNmzWW_story.html?utm_term=.1417963b278b ("[C]redit scores of black Americans have been systematically damaged, haunting their financial futures.").

reasons, as well as a racial income gap,[41] Black families also have a harder time qualifying for loan modifications.[42] The result is that Black families often have fewer options for escaping foreclosure, and they have a particular need for accurate information to evaluate what options they do have.

FDCPA protections are particularly essential for African American and other borrowers of color. As explained above, nonjudicial foreclosure is ripe for, and rife with, the abuses the FDCPA is meant to prevent, and those abuses disproportionately harm minority borrowers. Congress's intent for the FDCPA was to require debt collectors to be honest and forthright with borrowers about their obligations. Nowhere is this more important than in nonjudicial foreclosure, where the borrowers' stakes are enormous and their access to information is limited.

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[41] A recent study found that race is a significant factor in determining income, even after controlling for neighborhood and socioeconomic background. *See* Jenny Gathright, *Forget Wealth and Neighborhood. The Racial Income Gap Persists*, NPR (Mar. 19, 2018), https://www.npr.org/sections/codeswitch/2018/03/19/594993620/forget-wealth-and-neighborhood-the-racial-income-gap-persists.

[42] *See, e.g.* CAL. REINVESTMENT COALITION, RACE TO THE BOTTOM: AN ANALYSIS OF HAMP LOAN MODIFICATION OUTCOMES BY RACE AND ETHNICITY FOR CALIFORNIA (July 2011), http://www.calreinvest.org/system/resources/W1siZiIsIjIwMTEvMDcvMTlvMTFfMTBfMjdfOTg3X0hBTVBfUkVQT1JUX0ZJTkFMLnBkZiJdXQ/HAMP%20REPORT%20FINAL.pdf.

CONCLUSION

Because the FDCPA applies to nonjudicial foreclosure proceedings, the judgment of the Tenth Circuit should be reversed.

Respectfully submitted,

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September 14, 2018

No. 17-1307

IN THE

Supreme Court of the United States

DENNIS OBDUSKEY,

Petitioner,

v.

MCCARTHY & HOLTHUS LLP, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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INTEREST OF AMICUS[1]

The National Consumer Law Center ("NCLC") is a national research and advocacy organization focusing on the legal needs of consumers, especially low income and elderly consumers. The Fair Debt Collection Practices Act, 15 U.S.C. §1692 *et seq.* (the "FDCPA"), has been a major focus of NCLC's work. NCLC publishes *Fair Debt Collection* (9th ed. 2018), and *Collection Actions* (4th ed. 2017), comprehensive treatises to assist attorneys and debt collectors to comply with the law. This Court has relied upon *Fair Debt Collection* as supporting authority. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich*, 559 U.S. 573, 591 n.12 (2010). In addition to its debt collection work, NCLC works on a variety of issues related to foreclosures and mortgage servicing. NCLC publishes *Foreclosures and Mortgage Servicing* (5th ed. 2014), with a new edition forthcoming in 2018.

SUMMARY OF ARGUMENT

A mortgage foreclosure is the enforcement of a promissory note. A promissory note is a debt obligation. The McCarthy law firm regularly represents holders of promissory notes in foreclosures. These incontrovertible facts make the firm a "debt collector" under the first sentence of the FDCPA's definition of that term. 15 U.S.C. §1692a(6). The third sentence of §1692a(6) extends the definition of "debt collector" to a more narrowly defined category of debt collectors, namely enforcers

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae or its counsel made a monetary contribution to preparation or submission of this brief. Counsel for both parties have filed letters of blanket consent to the filing of amicus briefs with the Clerk.

of security interests who do not otherwise qualify as debt collectors under the general definition. Since McCarthy is clearly a debt collector under the general definition, it is not necessary to decide whether the firm qualifies as a debt collector under the narrow additional category.

Foreclosures are costly for homeowners. They are also costly for investors, government mortgage insurers, and entire communities. For this reason, investors, government insurers, federal agencies, and state laws require that those conducting foreclosures communicate regularly with homeowners throughout the foreclosure process. Before they can conduct a foreclosure sale, mortgage servicers and their attorneys must ensure that all alternatives to foreclosure have been exhausted. Today, in a state like Colorado, only about thirty percent of foreclosures that law firms commence result in a completed foreclosure sale. In the vast majority of cases the attorney withdraws the foreclosure before any sale takes place because the homeowner arranged an alternative to foreclosure.

It is inaccurate to say that a foreclosure law firm does nothing more than recover possession of collateral property. Foreclosure lawyers are not tow truck drivers who repossess motor vehicles. Instead, the law firms play an active role in communicating vital information to homeowners, trustees, and the courts during an extended process that plays out in a heavily regulated field.

Unfortunately, foreclosure law firms and their servicer clients have a miserable record at providing accurate information. Congressional reports and agency enforcement actions at the federal and state levels have repeatedly found widespread misconduct

in the routine work of these participants in the foreclosure industry. In 2012, for example, the attorneys general of forty-nine states, the Department of Justice, and HUD imposed sanctions totaling over $50 billion on the five largest mortgage servicers related to their conduct of foreclosures. Key aspects of the resulting consent decree addressed servicers' interactions with their attorneys. Courts have repeatedly expressed exasperation over the way the largest financial institutions and their attorneys handle routine foreclosures. Local courts and state legislatures have channeled substantial resources into the oversight of foreclosures, including mandating mediation, in an effort to promote the accurate delivery of information to consumers.

This case involves a straightforward request by a homeowner to get the facts about the status of his mortgage account. The FDCPA provides a right and remedy to the consumer to facilitate this exchange of information. Mr. Obduskey attempted to exercise this right at a critical time—when he received a notice from an attorney that a foreclosure action against his home was about to begin. Despite the plain text of the FDCPA's definition of "debt collector," the Tenth Circuit arrived at an interpretation of the Act that strips away the FDCPA's most essential protections from those most in need of them. For the reasons discussed below the Court's ruling should be reversed.

ARGUMENT

I. Introduction—the Role of Nonjudicial Foreclosures and Deficiency Claims.

In a judicial foreclosure a court enters a judgment in a civil action directing a sale of the mortgaged premises. The goals of the court-ordered sale are to satisfy the mortgage debt by transferring title of the property to the high bidder. In a nonjudicial foreclosure the lender or its assignee exercises a contractual right contained in the loan documents (a "power of sale" clause) to cause the property to be sold. Once again, the goals are to satisfy the mortgage debt and transfer title.

In thirty states nonjudicial foreclosures are permitted and are the primary method of foreclosing on residential properties.[2] Of these thirty primarily nonjudicial foreclosure jurisdictions, ten have enacted statutes that bar deficiency claims by the owner of the debt if the foreclosure sale does not produce enough money to satisfy the debt. These ten are primarily Western "deed of trust" states.[3] The bars on deficiency claims in these states apply only if the lender chooses the nonjudicial foreclosure option. In all jurisdictions that permit nonjudicial

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[2] *See* National Consumer Law Center, *Foreclosures and Mortgage Servicing*, Appendix F (Summary of State Foreclosure Laws) (5th ed. 2014). The figure includes the District of Columbia. Of these thirty jurisdictions typically referred to as allowing "nonjudicial" foreclosure procedures, four (Colorado, North Carolina, Maryland, and Louisiana) actually have "hybrid" systems that involve some limited judicial oversight before and after foreclosure sales.

[3] *Id.* These are: Alaska, Arizona, California, Hawaii, Minnesota, Montana, Nevada, North Dakota, Oregon, and Washington. The Nevada bar on deficiencies applies only to deeds of trust executed after October 2009.

foreclosures, lenders may still choose the judicial foreclosure option. Deficiency claims are always allowed after judicial foreclosures.

The majority of nonjudicial foreclosure states *do not* bar deficiency claims after nonjudicial foreclosure sales. However, in rendering its decision, the Tenth Circuit acted on the assumption that "[t]here is an obvious and critical difference between judicial and non-judicial foreclosures" and referred to a general bar on deficiency claims after nonjudicial foreclosures. *Obduskey v. Wells Fargo,* 879 F.3d 1216, 1221 (10th Cir. 2018). At the same time the Court acknowledged that Colorado, a nonjudicial foreclosure state, does not bar post-sale deficiency claims. *Id.*

The issue presented for this appeal is whether the FDCPA applies to nonjudicial foreclosures. Resolution of this question should not turn on whether a state's foreclosure laws bar post-foreclosure deficiency claims. A focus on whether a nonjudicial foreclosure bars a deficiency claim *after* a foreclosure sale reveals nothing about whether collection activities that occur *before* the foreclosure sale violate the FDCPA. The FDCPA violations in Mr. Obduskey's case occurred in the absence of any foreclosure sale. The fact that under certain state statutes a debt may later be extinguished after a nonjudicial foreclosure sale is not relevant when the FDCPA violation occurs while the debt clearly exists.

II. The Tenth Circuit Failed to Consider Each Distinct Element of Mr. Obduskey's FDCPA Claim and Instead Focused on an Erroneous Construction of the Term "Debt Collector."

Mr. Obduskey appropriately pled the statutory elements of an FDCPA claim, including: (1)

the obligation under his mortgage note was a "debt" (15 U.S.C. §1692a(5)); (2) the McCarthy Law Firm was a "debt collector" (15 U.S.C. §1692a(6)); and (3) McCarthy sent Mr. Obduskey an initial communication "in connection with" collection of the debt, but then proceeded with debt collection without responding to Mr. Obduskey's request for information about the debt, violating the FDCPA (15 U.S.C. §§1692g(b)).

The analysis of Mr. Obduskey's FDCPA claim must proceed step-by-step, giving appropriate weight to the plain statutory language and the meaning of the terms "debt," "debt collector," and "in connection with" the collection of a debt. Rather than analyze whether Mr. Obduskey had pled each statutory element, the Tenth Circuit conflated the three under the guise of construing the single term "debt collector." *Obduskey*, 879 F.3d at 1220–22.

A. Mr. Obduskey's Promissory Note Was a "Debt" Under 15 U.S.C. §1692a(5).

The term "debt" in the FDCPA means "any *obligation* or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property . . . . which are the subject of the transaction are primarily for personal, family, or household purposes" 15 U.S.C. §1692a(5) (emphasis added).

The Tenth Circuit relied heavily on the analysis of the term "debt" by the Ninth Circuit in *Vien-Phuong Thi Ho v. Reconstruct Co., N.A.*, 858 F.3d 568 (9th Cir. 2017), *cert. denied* 138 S. Ct. 504 (2017) ("*Ho*"). The *Ho* court equated the word "debt" that is defined in §1692a(5) of the FDCPA with "money." *Ho*, 858 F.3d at 571. The *Ho* court pointed out that after a trustee's sale, the trustee collects

money from the property's purchaser, not from the consumer. *Id.* at 572. The court went on to say, "Because the money collected from a trustee's sale is not money owed by a consumer, it isn't 'debt' as defined by the FDCPA." *Id.*

This statement is wrong for three reasons. First, it incorrectly equates "debt" with money and with the act of paying money, instead of with an *obligation* to pay money—ignoring the clear language of §1692a(5). Second, the money at issue *is* owed by the consumer. It is part of the debt obligation being enforced, *i.e.*, the note. Third, the interpretation of §1692a(5) conflicts with the plain language of 15 U.S.C. §1692a(6) that defines a debt collector as someone who "directly or indirectly" collects debts. The analysis effectively reads the word "indirectly" out of the statute and would require a transfer of money directly from the consumer to the debt collector, something the statute does not require.

1. A Mortgage Is an Obligation to Pay Money.

There are two key documents that make up a mortgage transaction. One is the promissory note. The other is the security instrument (the mortgage or deed of trust). *Reese v. Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211, 1216 (11th Cir. 2012). The note embodies the borrower's obligation to pay the debt. The mortgage designates the property that serves as collateral for payment of the debt, while the note is the source of the obligation to pay. RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) §5.4(c) (1997) ("A mortgage may be enforced only by, or on behalf of, a person who is entitled to enforce the obligation the mortgage secures.").

The primacy of the note over the mortgage is a principle that has long been recognized in American law. *Carpenter v. Longran*, 83 U.S. 271, 275 (1872); *McGoveny v. Gwillim*, 16 Colo. App. 284, 65 P. 346, 347 (1901) ("In Colorado, whether the form of security be a mortgage or a deed of trust, the debt is the principal thing. The security is a mere incident."). *See also Martinez v. Continental Enterprises*, 730 P.3d 308, 314 (Colo. 1986) ("Where, as here, any action to recover payment on a promissory note is barred by the six-year statute of limitations, foreclosure of the deed of trust securing the note is also barred.")

Despite some initial confusion spawned by the growth of securitized mortgage debt, most state courts have reached a consensus that a mortgage foreclosure, including foreclosure of a deed of trust, is the enforcement of a promissory note. *Yvanova v New Century Mortgage Corp.*, 62 Cal. 4th 919, 928, 365 P.3d 845, 851 (2016) ("In itself, the principle that only the entity currently entitled to enforce a debt may foreclose on the mortgage or deed of trust securing that debt is not, or at least should not be, controversial."). Dale A. Whitman and Drew Milner, *Foreclosure on Nothing: The Curious Problem of the Deed of Trust Foreclosure Without Entitlement to Enforce the Note*, 66 Ark. L. Rev. 21 (2013). Mortgage notes today are treated as negotiable notes and their enforcement is governed by Article 3 of the Uniform Commercial Code ("U.C.C.").[4] The party

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[4] Report of the Permanent Editorial Board for the Uniform Commercial Code: Application of the Uniform Commercial Code to Selected Issues Relating to Mortgage Notes (Nov. 14, 2011). Available at http://www.uniformlaws.org/Shared/Committees_Materials/PEBUCC/PEB_Report_111411.pdf.

with authority to enforce the note (determined under U.C.C. §3-301) is the only party entitled to foreclose a mortgage or deed of trust. *In re Miller*, 666 F.3d 1255 (10th Cir. 2012) (applying Colorado U.C.C. Article 3 to determine whether the creditor established authority to enforce a deed of trust, referencing the requirements of Colo. Rev. Stat. §§38-38-100.3(8), 38-38-101(1)(b)(I)–(III)).

Under the Article 3 framework, Mr. Obduskey was the maker of a mortgage note. Wells Fargo, according to McCarthy, was the beneficiary of the note and had the right to enforce it. Any payments made in connection with Mr. Obduskey's deed of trust had to go directly toward satisfaction of the debt defined by his promissory note. *In re Veal*, 450 B.R. 897, 910 (B.A.P. 9th Cir. 2011) ("Put another way, if a maker makes a payment to a 'person entitled to enforce,' the obligation is satisfied on a dollar for dollar basis, and the maker never has to pay that amount again.").

2. A Mortgage Note Is Owed by the Consumer Borrower.

The money at issue in a foreclosure *is* owed by the borrower. It is incorporated in the debt obligation being enforced, *i.e.*, the note. One purpose of every mortgage foreclosure sale is to obtain money that must be applied to eliminate or reduce dollar for dollar the amount owed on the note signed by the borrower. Colorado courts, like those of nearly all states, acknowledge this aspect of foreclosures. *Shapiro & Meinhold v. Zartman*, 823 P.3d 120, 124 (Colo. 1992) (*en banc*) ("a foreclosure is a method of collecting a debt by acquiring and selling secured property to satisfy a debt"); *McGoveny v. Gwillim*, 16 Colo. App. 284, 65 P. 346, 347 (1901) ("An action to

foreclose a mortgage or deed of trust is simply, in effect, an action to collect the debt, to secure the payment of which was the sole purpose of its execution.").

3. Equating "Debt" With "Money" Under the FDCPA Conflicts with the Plain Language of §1692a(6), Which Defines a Debt Collector as Someone Who "Directly or Indirectly" Collects Debts.

In construing the term "debt" the Tenth Circuit implied a requirement for direct payment to the debt collector. Such a requirement is not only entirely absent from the definition of "debt" in §1692a(5), but it is plainly contradicted by the "directly or indirectly" reference to debt collection in the definition of "debt collector" found in §1692a(6).

The foreclosure process in Colorado inherently involves attempts, both directly and indirectly, to collect a debt. The line of cases upon which the Tenth Circuit relied is grounded on the false proposition that "foreclosing on a trust deed is distinct from the collection of the obligation to pay money." *Hulse v. Ocwen Fed. Bank, FSB,* 195 F. Supp. 2d 1188, 1204 (D. Or. 2002). This proposition is erroneous as a matter of both contract law and property law. As described above, foreclosure directly enforces the creditor's contractual right to payment under the note. Foreclosure also drastically impacts the borrower's property rights. The attorney's scheduling a foreclosure sale forces the borrower to pay the debt in full by the sale date or forever lose the right to acquire unencumbered title to the property. Colo. Rev. Stat. §38-38-501; *Mount Carbon Metropolitan District v. Lake George Co.,*

847 P. 2d 254, 256–57 (Colo. Ct. App. 1993). In addition, setting a sale date triggers a strict time limit for the right to cure. In curing a default the borrower may stop the sale by paying only the arrearage, rather than the full redemption amount. A Colorado statute allows the borrower to cure a default by paying "all sums that are due and owing under the evidence of debt and deed of trust" up to noon on the day of a scheduled foreclosure sale. Colo. Rev. Stat. §38-38-104(2)(b).

Finally, a foreclosure sale under Colorado law does not end the borrower's obligation to pay the debt. Colorado has not enacted any statutory bar on post-foreclosure deficiency claims. *Franks v. Colorado National Bank of Arapahoe,* 855 P.2d 455, 457 (Colo. Ct. App. 1994). Before a foreclosure sale in Colorado, the attorney for the noteholder prepares and submits to the public trustee an itemized bid form. This form includes the creditor's deficiency claim. Colo. Rev. Stat. §38-38-106.

Through all of these means the foreclosure attorney uses the property both directly and indirectly to compel payment of the debt.

B. The McCarthy Law Firm is a "Debt Collector" Under 15 U.S.C. §1692a(6).

The FDCPA defines a "debt collector" to be someone who "regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another" 15 U.S.C. §1692a(6). As discussed below, the McCarthy firm meets this "regularly collects" debt collector definition.

1. McCarthy Regularly Engages in Direct and Indirect Collection of Debts for Others—the Beneficiaries of Mortgage Notes.

The McCarthy firm is a major law office that routinely conducts foreclosures in the Western deed of trust states.[5] As discussed in the preceding section, the goal of these foreclosures is to collect a "debt." Mr. Obduskey's Complaint appropriately alleged that the McCarthy firm is engaged in the practice of regularly collecting debts owed to others. Complaint ¶ 4 (J.A. 29).

In its August 2014 initial contact letter to Mr. Obduskey (J.A. 37) and its May 12, 2015 Notice of Election and Demand for Sale by Public Trustee (J.A. 39), the McCarthy firm identified itself as representing Wells Fargo. McCarthy stated that it had been "instructed to commence foreclosure" against Mr. Obduskey's residence. (J.A. 37). McCarthy identified Wells Fargo as the "Current Holder of the Evidence of the Debt." (J.A. 39). The law firm stated unequivocally that it was enforcing both the "Deed of Trust" and the "Evidence of Debt." *Id.* Thus, the debt at issue was clearly "owed or due another."

In undertaking to represent the holder of Mr. Obduskey's promissory note in a Colorado foreclosure, McCarthy was obligated to perform specific tasks that constituted direct or indirect debt collection. The foreclosure law firm must ensure that the entity seeking to foreclose has evidence of the debt and has authority to foreclose, and then must

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[5] A Westlaw search indicates approximately one thousand decisions that involve foreclosure actions listing the McCarthy firm as counsel of record.

certify this information to the public trustee. Colo. Rev. Stat. §38-38-101. The attorney prepares the pre-foreclosure notice to the borrower (Colo. Rev. Stat. §38-38-102.5) and the notice of election and demand for sale (Colo. Rev. Stat. §38-38-101(4)). The firm must monitor compliance with state law requirements that loss mitigation options be considered before a foreclosure sale. Colo. Rev. Stat. §38-38-103.2. The firm must provide correct cure information to the trustee and must be prepared to stop the foreclosure if the borrower pays the appropriate cure amount. Colo. Rev. Stat. §38-38-104(2). Before a foreclosure sale, the firm must submit a bid form to the public trustee. Colo. Rev. Stat. §38-38-106. The bid form requires that the attorney identify the amount of the deficiency owed. *Id.*

In addition, like any law firm representing the noteholder in a Colorado foreclosure, McCarthy must appear in judicial proceedings. Colo. Rev. Stat. §38-38-105. These proceedings are governed by Colo. R. Civ. P. 120. Under Rule 120 the attorney must obtain court approval before directing a public trustee to conduct a foreclosure sale. Colo. R. Civ. P. 120(d). After the sale, the foreclosure attorney must obtain confirmation from the court that the sale was conducted properly. Colo. R. Civ. P. 120(g). The attorney representing the noteholder in the Rule 120 hearing must be prepared to address significant issues concerning the debt, including the existence of a default, the status of loan modification requests, and evidence of the foreclosing party's status as noteholder. Colo. R. Civ. P. 120(d)(1).

In its foreclosure-related debt collection activities the McCarthy firm uses the office of the public trustee to perform specific tasks. However,

the trustee acts at the firm's direction and relies on McCarthy for all of its information about the loan. The fact that an attorney uses officials such as a public trustee, a sheriff, a judge, and other court personnel as it regularly collects debts does not alter the status of the law firm as a "debt collector" under the FDCPA. *Heintz v. Jenkins*, 514 U.S. 291, 294 (1995) ("a lawyer who regularly tries to obtain payment of consumer debts through legal proceedings is a lawyer who regularly 'attempts' to 'collect' those consumer debts.").

2. Section 1692a(6)'s First Sentence Subjects a Law Firm that Regularly Collects Mortgage Debts to the FDCPA's Broad Coverage.

Section 1692a(6) of the FDCPA begins with a general definition of "debt collector." This general definition covers entities that "regularly collect" debts and entities that have as their "principal purpose" the collection of debts. 15 U.S.C. §1692a(6) (first sentence). The McCarthy firm regularly enforces mortgage notes. This means that it regularly collects debts. The fact that the notes are secured by deeds of trust does not exclude McCarthy from the general definition of a debt collector.

Section 1692a(6) goes on to state that the general definition of "debt collector" "also includes" entities that have the enforcement of security interests as their principal purpose. 15 U.S.C. §1692a(6) (third sentence). Entities whose principal purpose is the enforcement of security interests, as described in the third sentence, are subject to §1692f(6), a subsection of the FDCPA that prohibits certain misconduct in repossessions.

The inclusion of security interest enforcers in §1692a(6)'s third sentence does not exclude enforcers of mortgage debts from §1692a(6)'s general definition of "debt collector." The text does not say that an entity that regularly collects debts is subject "only to" or is "limited to" compliance with §1692f(6) if it also enforces security interests. The Ninth Circuit in *Ho* implied terms of limitation and exclusion that do not appear in the statute. *Ho,* 858 F.3d at 573–74. To the contrary, Congress stated that the definition of "debt collector" in §1692a(6) "also includes" certain security interest enforcers who violate §1692f(6) as described in the third sentence. Congress employed a term of inclusion, not exclusion, in establishing the relationship between the first and third sentences of §1692a(6). *Wilson v. Draper & Goldberg, P.L.L.C.,* 443 F.3d 373, 378 (4th Cir. 2006) (§1692a(6)'s third sentence "does not exclude those who enforce security interests but who also fall under the general definition of 'debt collector'"); *McCleary v. DLJ Mortgage Capital, Inc.*, 2017 WL 4542054, at *5 (S.D. Ala. Oct. 11, 2017) ("'Also' is a term of addition, not of subtraction, and it makes little sense to say that an entity that satisfies the 'regularly collects' definition has its broad exposure to liability under many substantive provisions erased simply because it also satisfies the 'security interests' definition and/or is enforcing a security interest."); *Burling v. Windsor Equity Group, Inc.*, 2012 WL 5330916, at *3 (C.D. Cal. Oct. 18, 2012) ("Based on the weight of authority, the Court concludes that an entity engaged in the principal business of enforcing security interests is not subject to the FDCPA, *unless* that party acts in violation of §1692f(6), *or* the party falls within the second prong of the definition of a 'debt collector' in that it 'regularly collects or attempts to collect' debts owed to another.")

(emphasis in original). *See also Glazer v. Chase Home Finance, LLC*, 704 F.3d 453, 465 n.6 (6th Cir. 2013) ("Nothing in our decision precludes the application of the entire FDCPA to a repossessor who 'regularly' collects debts for another and thus satisfies the general definition of 'debt collector.'").

3. Section 1692a(6)'s Third Sentence Covers Repossessors of Personal Property Who Are Not Involved in Demands for Payment or Liquidation Sales.

Section 1692a(6)'s third sentence applies to companies that enforce security interests as their principal business but do not regularly collect debts. These companies exist. Section 1692f(6) refers to companies that take "nonjudicial action to effect dispossession or disablement of property." These terms harken to the U.C.C.'s language applicable to enforcement of Article 9 security interests in personal property, U.C.C. §9-609(a). The U.C.C. section provides that "[a]fter default" "a secured party: (1) may take possession of the collateral; and (2) without removal, may render equipment unusable and dispose of collateral on a debtor's premises under Section 9-610."

Because self-help repossessions under U.C.C. §9-609 can be a risky business, automobile finance lenders hire independent contractors to carry out this work. In doing so, the lenders hope to minimize their exposure to breach of the peace claims. James J. White & Robert S. Summers, *Uniform Commercial Code* §34.18 (6th ed. 2015) (observing that creditors "hire an 'independent contractor' to do the repossession" because "[i]n theory at least, the independent contractor is not authorized to breach

the peace, and if he does so, it is his own problem"). FDCPA §1692f(6) applies to such an "independent contractor." For example, in *Barnes v. Northwest Repossession, LLC,* 210 F. Supp. 3d 954 (N.D. Ill. 2016), the court found that such a contractor violated §1692f(6) when it repossessed a vehicle when the creditor did not have a currently enforceable security interest in the collateral.

The *Ho* court's interpretation of §1692a(6)'s third sentence conflicts with the view of the agencies charged with enforcing and interpreting the FDCPA for the past three decades. In 1988, the Federal Trade Commission ("FTC") issued Statements of General Policy or Interpretation, Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50,097 (Dec.13, 1988) ("the Commentary"). The Commentary tracks the plain statutory language in its treatment of the term "security enforcers" used in §1692f(6) as follows: "[b]ecause the FDCPA's definition of 'debt collection' includes parties whose principal business is enforcing security interests only for section 808(6) [§1692f(6)] purposes, such parties (*if they do not otherwise fall within the definition*) are subject only to this provision and not to the rest of the FDCPA." 53 Fed. Reg. at 50,108 (emphasis added). The general definition in the first sentence of §1692a(6) thus complements the inclusion of certain security interest enforcers by the third sentence. Similarly, the Consumer Financial Protection Bureau ("CFPB"), charged with interpreting and enforcing the FDCPA since 2011, has repeatedly supported the view that the full range of FDCPA protections apply in all mortgage foreclosure proceedings. The CFPB articulated this view in at least three amicus briefs submitted to the courts of appeals. *Cohen v. Rosicki, Rosicki, &*

Associates, P.C., 897 F.3d 75 (2d Cir. 2018); *Vien-Phuong Thi Ho v. Reconstruct Company, N.A.*, 858 F. 3d 568 (9th Cir. 2017); *Birster v. American Home Mortg. Servicing, Inc.*, 481 Fed. Appx. 579 (11th Cir. 2012). The amicus briefs are available at www.consumerfinance.gov.

4. The FDCPA's Definition of "Debt Collector" Does Not Turn on the Type of Remedy the Entity Exercises.

The relevant activity that triggers broad application of the FDCPA to McCarthy is the collection of debts. Section 1692a(5) defines a "debt" by the underlying transaction and its purpose. The relevant transactions here are promissory notes signed by consumers to finance the purchase of their residences. "Debt" is not defined with reference to the manner in which, years later, the creditor chooses to enforce the obligation. *Cohen v. Rosicki, Rosicki & Associates, P.C.*, 897 F.3d 75, 82–83 (2d Cir. 2018).

A mortgage note can be enforced either by a civil action to obtain a money judgment or by a foreclosure to force a sale of the property. In most jurisdictions, including Colorado, the mortgage creditor has recourse to both options. *Mortgage Investments Corp. v. Battle Mountain Corp.*, 70 P.3d 1176, 1184–85 (Colo. 2003). Under the *Ho* court's view, a law firm could regularly harass borrowers without concern for the FDCPA as long as it did so only as part of an effort to take the borrowers' homes as part of an effort to comply with state foreclosure law. However, the same law firm would be subject to the full range of FDCPA prohibitions if it enforced the same mortgage note by obtaining a money

judgment and attempting to garnish a few hundred dollars from a borrower's bank account. The text of the FDCPA provides no support for this kind of disproportionate outcome hinging solely on the remedy the debt collector chooses.

C. Mr. Obduskey Stated a Valid Claim for Violation of 15 U.S.C. §1692g.

The Tenth Circuit focused on Mr. Obduskey's claim that the McCarthy firm violated FDCPA §1692g.[6] This provision regulates the debt collector's "initial communication" with the consumer "in connection with the collection of any debt" and establishes the consumer's right to obtain verification of the debt from the debt collector. 15 U.S.C. §§1692g(a), (b). McCarthy's August 2014 letter was the firm's initial communication to Mr. Obduskey. (Ex. 19). The letter informed Mr. Obduskey that the firm had been instructed to commence foreclosure against his home. It told him how much he owed on the debt and advised him to contact the law firm to dispute the debt or to obtain more information about the debt. The letter clearly met the "in connection with the collection of any debt" element of §1692g(a).[7]

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[6] In addition to §1692g, Mr. Obduskey alleged that McCarthy violated other provisions of the FDCPA, including §§1692c, 1692d, 1692e, and 1692f. These provisions, like §1692g, prohibit certain forms of debt collector conduct "in connection with the collection of a[ny] debt" (§§1692c, 1692d, 1692e), or a debt collector's use of certain "means to collect or attempt to collect a debt" (§1692f).

[7] A communication satisfies the "in connection with the collection of a debt" standard even though it does not include a demand for payment. *McLaughlin v. Phelan Hallinan & Schmieg, LLP*, 756 F.3d 240, 246 (3d Cir. 2014); *Gburek v. Litton Loan Servicing LP*, 614 F.3d 380 (7th Cir. 2010). *See*

Mr. Obduskey's August 2014 dispute letter to McCarthy in response triggered the debt collector's duty to respond within a fixed time and provide validation information. 15 U.S.C. §1692g(b). McCarthy did not timely respond and instead in May 2015 directed that Mr. Obduskey's home be sold at a foreclosure sale. (J.A. 39).

The Tenth Circuit agreed that Mr. Obduskey "sufficiently pled that McCarthy failed to verify Mr. Obduskey's debt after it was disputed, in violation of §1692g." *Obduskey,* 879 F.3d at 1220. The court's ruling that McCarthy's conduct violated a substantive provision of the FDCPA has not been challenged.

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also Grden v. Leikin Ingber & Winters PC, 643 F.3d 169, 173 (6th Cir. 2011) ("So the question is where to draw the line. We draw it at the same place the Seventh Circuit did in *Gburek:* for a communication to be in connection with the collection of a debt, an animating purpose of the communication must be to induce payment by the debtor. . . .Thus, to use the language of §1692e, a letter that is not itself a collection attempt, but that aims to make such an attempt more likely to succeed, is one that has the requisite connection."). The debt collector's subjective intent behind a communication is irrelevant. The standard is objective. The court must consider how the "least sophisticated consumer" would view the communication. *Jacobson v. Healthcare Financial Services, Inc.*, 516 F.3d 85, 90 (2d Cir. 2008).

III. Compliance with the FDCPA Does Not Impede Compliance with Colorado Foreclosure Law.

A. The FDCPA Debt Validation Process Under 15 U.S.C. §1692g Furthers Effective Use of the Right to Cure Under Colo. Rev. Stat. §38-38-104.

Colorado has no interest in promoting unnecessary foreclosures. The state has enacted a statute that allows homeowners to reinstate or "cure" mortgage defaults during much of the foreclosure process. Colo. Rev. Stat. §38-38-104. Under this law a homeowner can submit to the public trustee a request to cure a mortgage default and stop foreclosure up to twelve days before a scheduled foreclosure sale. Colo. Rev. Stat. §38-38-104(2)(a)(I). Pursuant to the statute, when a homeowner seeks to cure a default, the attorney who prepared the notice of election to sell the property must prepare a detailed statement of the arrearage and give it to the trustee. The trustee relies on this statement to implement a cure.

Mr. Obduskey's August 2014 letter sought information directly related to his right to cure. McCarthy ignored the letter. Having law firms comply with §1692g(b) promotes the exchange of accurate information about mortgage debts and thus furthers the paramount public policy goal of Colorado's mortgage cure statute.[8]

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[8] The Government Sponsored Enterprises ("GSEs") Fannie Mae and Freddie Mac own or insure most residential mortgage loans in the United States. All standard GSE security instruments contain terms allowing homeowners to cure mortgage defaults before acceleration and before a foreclosure sale. Standard GSE Security Instrument ¶¶ 19, 22). FDCPA

Data from the Colorado trustees show that the cure right makes a difference. For example, in Denver, the state's largest county, the trustee reports that for the first seven months of 2018 borrowers requested to cure in 39% of the cases referred for foreclosure. Homeowners implemented cures in 15% of the cases.[9] Statewide data reflect that during 2017 homeowners implemented cures in 10% of the cases sent to foreclosure.[10] Notably, at the state level in 2017 foreclosures were withdrawn in 71% of the cases referred to the trustees for foreclosure.[11] These withdrawals would include not only cures, but instances of loan modifications, short sales, and other loss mitigation alternatives to foreclosure.

B. The Tenth Circuit's Concerns About Conflicts Between the FDCPA and Colorado Foreclosure Law Are Unfounded.

The Tenth Circuit raised two concerns about FDCPA preemption of Colorado law, both taken directly from the *Ho* court's view of California law. The Tenth Circuit's concerns were: (1) the motion for a court order authorizing a foreclosure sale under

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§1692g also furthers the exercise of this contractual right to cure, an important loss mitigation policy of these major federal home loan programs.

[9] Compiled from monthly average figures reported by Denver Office of the Clerk and Recorder, at https://www.denvergov.org/content/denvergov/en/denver-office-of-the-clerk-and-recorder/foreclosures/foreclosure-stats.html.

[10] Colorado foreclosure statistics from the Colorado County Treasurers and Public Trustees Association, available at http://www.e-ccta.org/PTAC/foreclosure%20statistics.htm.

[11] *Id.*

Colo. R. Civ. P. 120(a) must be served on non-debtors, such as junior lienholders, potentially violating 15 U.S.C. §1692c(b); and (2) the motion must be served directly on homeowners, and the homeowners could be represented by counsel, violating 15 U.S.C. §1692c(a)(2). *Obduskey,* 879 F.3d at 1222.

Colorado Rule of Civil Procedure 120 specifically directs that service of the foreclosure motion packet be made on junior lienholders and on the borrower. An exception under §§1692c(a) and 1692c(b) shields communications made with "the express permission of a court of competent jurisdiction." 15 U.S.C. §§1692c(a), 1692c(b). As the Seventh Circuit recently held, this exception applies to a debt collector's communications mandated by a court rule. *Holcomb v. Freedman Anselmo Lindberg, LLC,* ___F.3d___, 2018 WL 3984544, at *2 (7th Cir. Aug. 21, 2018) ("A court rule expressly *requiring* a certain action obviously *permits* that action, so a rule requiring service directly on a party expressly permits such service.") (emphasis in original).

Another exception under §§1692c(a) and 1692c(b) shields communications made with "the prior consent of the consumer given directly to the debt collector." In the narrow context of communications required by state foreclosure statutes, courts have predictably found that the ubiquitous clauses in deeds of trust in which the borrower consents to a power of sale foreclosure in the event of a default have conveyed consent for the purposes of §§1692c(a) and 1692c(b). *Walker v. Fabrizio & Brook, P.C.,* 2017 WL 5068340, at *3 (E.D. Mich. Nov. 2, 2017); *McCray v. Samuel I. White, P.C.,* 2017 WL 1196586, at *7 (D. Md. Mar. 31, 2017); *Maynard v. Cannon,* 650 F. Supp. 2d 1138,

1143 (D. Utah 2008), *aff'd,* 401 Fed. Appx. 389 (10th Cir. 2010). Application of these rulings here is consistent with the prevailing FDCPA jurisprudence that has invoked these consent exceptions sparingly, typically to avoid absurd or anomalous results. *E.g., Clark v. Capital Credit & Collection Services, Inc.*, 460 F.3d 1162, 1168–73 (9th Cir. 2006). *See generally* H.R. Rep. No. 131, 95th Cong., 1st Sess. 5 (1977). Indeed, the dissent in *Ho* noted that these consent exceptions appropriately addressed the majority's concerns about potential conflicts between the FDCPA and California foreclosure law: "the net effect of the borrower's consent is to permit the foreclosure to go forward in the manner prescribed by California law." *Ho,* 858 F.3d at 588 (Korman, D.J., dissenting).

This Court has cautioned against constructions of §1692c that needlessly thwart creditors' established statutory remedies under state laws. *Heintz v. Jenkins,* 514 U.S. 291, 296 (1995) (agreeing that "it would be odd if the Act empowered a debt-owing consumer to stop the 'communications' inherent in an ordinary lawsuit and thereby cause an ordinary debt-collecting lawsuit to grind to a halt"). Lower courts have followed this directive and interpreted the FDCPA and state foreclosure laws to shield communications to the borrower and lienholders necessary to comply with state foreclosure law. *Nadel v. Marino,* 2017 WL 4776991, at *2 (D. Md. Oct. 20, 2017) (no violation of §1692c(b) when foreclosure trustee filed "a motion as part of ordinary litigation"). *See Acosta v. Campbell,* 309 Fed. Appx. 315, 316 (11th Cir. 2009) (no §1692c(b) violation in communications between lender's counsel and counsel for junior mortgagee).

Courts have held that the FDCPA applies to foreclosures in circuits that comprise the majority of states in the United States. Appellate court rulings date back to 2006, when the Fourth Circuit ruled in *Wilson v. Draper & Goldberg,* 443 F.3d 373 (4th Cir 2006). The Tenth Circuit pointed to no specific instances where courts have found that a foreclosure law firm violated the referenced FDCPA sections merely by serving a court filing or recorded document on parties in the manner prescribed by state foreclosure law. Notably, the law in Colorado since 1992 has been that the broad scope of FDCPA provisions apply to foreclosure proceedings under Colo. R. Civ. P. 120. *Shapiro & Meinhold v. Zartman,* 823 P.3d 120, 124 (Colo. 1992) (*en banc*). The Tenth Circuit's hypothetical concerns about the FDCPA crippling Colorado foreclosures never materialized. Mr. Obduskey's validation of debt claim under §1692g did not interfere with the conduct of a foreclosure under Colorado law. Rather, compliance with the FDCPA would have furthered state law goals and objectives.

IV. The FDCPA Addresses Pervasive Problems in the Residential Mortgage Industry

Foreclosures are costly both for borrowers and for investors in mortgage debt. Studies have shown that investors can lose up to one-half of their investment in mortgage debt when a foreclosure takes place. Alan M. White, *Deleveraging the American Homeowner: The Failure of 2008 Voluntary Mortgage Contract Modifications,* 41 Conn. L. Rev. 1107 (2009) (average loss to investors on a foreclosed loan was $150,000, over 50% of loan

amount, based on extensive 2008 data).[12] These losses quickly rise to billions of dollars when viewed across the entire industry. Groups representing investors in mortgage loans have emphasized that servicers' mishandling of borrowers' accounts harms their interests as well as borrowers:

> Mortgage investors typically invest on behalf of state pension funds, retirement systems, university and charitable endowments. Overall, more than 90 percent of the money invested in mortgage-backed securities represents public money. These investors have suffered material losses as a result of faulty and inefficient and at times improper servicing of the mortgage loans, for example, the improper analysis of a borrower's finances and holistic debt. Instead of helping homeowners, servicers' interactions with borrowers often make the process more confusing. This delays resolutions and can worsen the homeowners' position. The current servicing model further harms borrowers by dumping excessive fees (ultimately recouped by servicers) on them during the modification process. More broadly, the abuses and conflicts

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[12] More recent estimates of loss severities range from 25% to 45% depending on the type of loan. *Standard and Poor's Global Rating U.S. Residential Mortgage Performance Snapshot* (2d Quarter 2016) at p.14. Available at https://www.spratings.com/documents/20184/1393097/US+Residential+Mortgage+Performance+Snapshot+-+Q2+2016/85bda6bc-06d4-4e52-9c9a-059e53f9e784.

> within today's broken servicing model are creating longer term housing and mortgage problems that impact large parts of the U.S. population.[13]

Most residential mortgages in the United States are owned, guaranteed, or insured by the two government sponsored enterprises (Fannie Mae and Freddie Mac). Three federal agencies, the Federal Housing Administration (FHA), the Veterans Administration, and the Department of Agriculture's Rural Housing Service, insure another significant portion of American residential mortgage loans. There is therefore an enormous public fiscal stake in preventing unnecessary foreclosures.

Mortgage servicers and their attorneys operate under financial incentives that are not consistent with the interests of investors in mortgage debt. Tara Twomey and Adam Levitin, *Mortgage Servicing,* 28 Yale J. on Regulation 1 (2011). Servicers typically service loans owned by others and these servicers do not have a direct financial stake in how the loans perform. They do not get paid more when a loan performs well, and instead they can benefit from recovering advances, costs, and fees when a foreclosure takes place. Diane E. Thompson, *Foreclosing Modifications, How Servicers' Incentives Discourage Loan Modifications,* 86 Wash. L. Rev. 755 (2011).

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[13] American Association of Mortgage Investors, *White Paper: The Future of the Housing Market for Consumers after the Crisis: Remedies to Restore and Stabilize America's Mortgage and Housing Market* (Jan. 2011) at p. 1. Available at https://www.nclc.org/mortgage-servicing-books-tools-and-other-resources/mortgage-servicing-other-resources.html

In addition to these misplaced incentives, the fragmentation of tasks within the mortgage servicing and foreclosure industries has caused many of the problems that plague investors and consumers. Servicers, their attorneys, and a wide range of subcontractors operate from silos, using software programs that are poorly coordinated and produce inconsistent and inaccurate information. Attorneys and servicers in turn communicate this misinformation to consumers.

The courts aptly described the structural problems that impair foreclosure attorneys' ability to provide accurate account information to homeowners in the case of *In re Taylor,* 655 F.3d 274 (3d Cir. 2011). The Third Circuit affirmed the extensive findings of the bankruptcy court regarding a foreclosure firm's debt collection practices in the bankruptcy court. *In re Taylor,* 407 B.R. 618 (Bankr. E.D. Pa. 2009). The bankruptcy court in *Taylor* had inquired into why a foreclosure firm repeatedly filed documents claiming inconsistent and erroneous amounts due on mortgage debts. Testimony from the staff of the servicer and the law firm revealed that a software program essentially hired and controlled the law firm and operated with virtually no input from human staff of the servicer. Non-attorney staff drafted documents based solely on the data uploaded from a contractor's computer platform. The bankruptcy court raised significant questions as to how foreclosure attorneys could comply with their ethical obligation to investigate facts and exercise independent judgment when the computer program created a virtual wall between the attorneys and the owners of the obligations. 407 B.R. at 645. In affirming the bankruptcy court's imposition of sanctions on the law firm, the Court of

Appeals noted that the lawyers' practice "emphasized high-volume, high speed processing of foreclosures to such an extent that it led to violations of Rule 9011." 655 F.3d at 287.

State courts have had to devote substantial resources to dealing with the careless practices of foreclosure law firms. *See Homeward Residential Inc. v. Gregor*, 122 A.3d 947, 952 (Me. 2015) ("Applying established law, however, has become more problematic as courts address the problems the financial industry has created for itself."); *Deutsche Bank v. Johnston*, 369 P.3d 1046, 1053 (N.M. 2016) (noting "pervasive failure among mortgage holders to comply with the technical requirements underlying the transfer of promissory notes, and more generally the recording of interests in property"); *U.S. Bank N.A. v. Ibanez*, 941 N.E.2d 40, 55 (Mass. 2011) (decrying "the utter carelessness with which the plaintiff banks documented the titles to their assets") (Cordy, J. concurring). Bankruptcy courts have come to similar conclusions about how foreclosure law firms operate.[14]

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[14] *In re Waring*, 401 B.R. 906 (Bankr. N.D. Ohio 2009) (critiquing servicer's practice of farming out legal work in manner that precluded debtors and their attorneys from communicating with owner of obligation); *In re Parsley*, 384 B.R. 138 (Bankr. S.D. Tex. 2008) (local counsel's restricted relationship with national counsel effectively barred local counsel from communication with client); *In re Ulmer*, 363 B.R. 777 (Bankr. D.S.C. 2008) (sanctions imposed against law firm that allowed out-of-state paralegals to prepare motions filed electronically with court without attorney review); *In re Rivera*, 342 B.R. 435 (Bankr. D.N.J. 2006), *subsequent decision at* 369 B.R. 193 (Bankr. D.N.J. 2007), *aff'd*, 2007 WL 1946656 (D.N.J. June 27, 2007) ($125,000 penalty under Rule 9011 assessed against law firm for filing 150 robosigned motions with court).

Computer programs commonly used by mortgage servicers, the foreclosure firms' clients, also lead to many types of accounting abuses. The bankruptcy court examined these systems in *In re Jones,* 366 B.R. 584 (Bankr. E.D. La. 2007), *subsequent decision at* 2007 WL 2480494 (Bankr. E.D. La. Aug. 29, 2007), *aff'd,* 391 B.R. 577 (E.D. La. 2008). After an extensive investigation the bankruptcy court in *Jones* concluded that the servicer overcharged the homeowner $24,450.65 during the twenty-nine months her chapter 13 plan was in effect. *Jones,* 366 B.R. at 604. The servicer involved was Wells Fargo, the nation's largest. The company admitted it had used its standard practices in the case. The servicer could not explain many of its own charges, including multiple duplicative property inspection charges, some of which were reported as incurred during times when the property was inaccessible after Hurricane Katrina. 366 B.R. at 596–98.

The Consumer Financial Protection Bureau tracks the subject area and nature of consumer complaints to the Bureau. Debt collection disputes consistently produce the highest volume of complaints. Mortgage servicing also generates one of the highest complaint levels. Consumer Financial Protection Bureau, *Monthly Complaint Report* Vol. 19 (Jan. 2017), at p. 5 (debt collection ranks first with 292,903 cumulative complaints since 2011, mortgages third, with 260,482 cumulative complaints). During the foreclosure crisis many homeowners sought help to avoid foreclosure through the use of loan modifications. Servicer mishandling of these applications was widely

documented.[15] Mismanagement of homeowners' requests for loss mitigation heightens investors' losses because it allows unnecessary foreclosures to proceed.

Parties conducting foreclosures are subject to extensive regulation. The government guarantors Fannie Mae and Freddie Mac publish extensive guidelines that foreclosure attorneys and their clients must adhere to throughout the foreclosure process.[16] Most residential mortgages in the United States are subject to these guidelines. The guidelines include requirements for ongoing contact to conduct loss mitigation reviews during foreclosure. Government insurers such as the FHA also require strict compliance with guidelines for loss mitigation

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[15] United States Government Accountability Office, *Troubled Asset Relief Program: Results of Housing Counselor Survey of Borrower Experiences in the HAMP Program GAO Report 11-367R* (May 26, 2011); United States Government Accountability Office, GAO Report to Congressional Committees, *Troubled Asset Relief Program, Further Action Needed to Fully and Equitably Implement Foreclosure Mitigation Program 14–28* (June 24, 2010) (GAO 10-634); Office of the Special Inspector General for the Troubled Asset Relief Program, SIGTARP, Quarterly Report to Congress (Oct. 26, 2010); California Reinvestment Coalition, *The Chasm Between Words and Deeds X:How Ongoing Mortgage Servicing Problems Hurt California Homeowners and Hardest-Hit Communities* (May 2014).

[16] Fannie Mae Single Family Servicing Guide Part D and E (August 15, 2018), available at https://www.fanniemae.com/content/guide/servicing/index.html, and Freddie Mac Single Family Seller/Servicer Guide, Series 9000, available at http://www.freddiemac.com/singlefamily/pdf/guide.pdf.

reviews during foreclosures.[17] The 2012 National Mortgage Settlement involving the largest mortgage servicers, state attorneys general, and federal agencies established new communication guidelines that apply during foreclosure.[18] The RESPA mortgage servicing rules promulgated by the CFPB in 2014 codified many of the National Mortgage Settlement's requirements concerning the content and timing of communications about the status of mortgage loans in default.[19]

Broad FDCPA coverage holds foreclosure attorneys and servicers accountable to provide accurate information about consumers' accounts and helps ensure that foreclosures occur only when it is appropriate under state law. The FDCPA provides an incentive to improve account management technology while discouraging other practices, such as fee maximization and ignoring viable loss mitigation options.

V. At a Minimum, Security Interest Enforcers Are Liable for Violations of Section 1692f(6).

While the Tenth Circuit followed nearly all aspects of the Ninth Circuit's reasoning in *Ho*, the court departed from the Ninth Circuit (and all other courts) with respect to one issue. According to the Tenth Circuit, no provisions of the FDCPA applied to non-judicial foreclosures in Colorado. *Obduskey*, 879

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[17] U.S. Dept. of HUD Single Family Policy Handbook 4000.1 Part III (Mar. 2016). Available at https://www.hud.gov/program_offices/housing/sfh/handbook_4000-1.

[18] National Mortgage Settlement Consent Decree Terms. Available at http://www.nationalmortgagesettlement.com/about.html.

[19] 12 C.F.R. § 1024.35 through § 1024.41.

F.3d at 1224 n.4. All other courts that endorsed the narrow view of debt collection in the foreclosure context have agreed that the provisions of §1692f(6) apply to entities carrying out nonjudicial foreclosures. *Dowers v. Nationstar Mortgage, L.L.C.*, 852 F.3d 964, 971 n.3 (9th Cir. 2017). All parties in *Ho* agreed that the trustee was a debt collector within the narrow scope of §1692f(6). *Ho*, 858 F.3d at 573.

Section 1692f(6) defines as "unfair practices," *inter alia*, taking or threatening to take property if "there is no present right to possession of the property claimed as collateral through an enforceable security interest." 15 U.S.C. §1692f(6)(A). Courts rejecting a broad application of the FDCPA to foreclosures still have applied §1692f(6) when a party conducted a foreclosure without complying with terms of the deed of trust. *See, e.g., Puryer v. HSBC Bank USA NA*, 419 P.3d 105, 113 (Mont. 2018). Other courts have held that attempts to enforce a deed of trust without authority to act for the noteholder may violate §1692f(6). *Dowers v. Nationstar Mortgage, L.L.C.*, 852 F.3d at 971; *Moore v. Federal National Mortgage Association*, 2012 WL 424583, at *5 (W.D. Wash. Feb. 9, 2012). Foreclosing without authority to enforce the loan documents causes significant harm to consumers. The practice also impairs the reliability of titles that pass through foreclosure deeds. *See* Adam J. Levitin, *The Paper Chase: Securitization, Foreclosures, and the Uncertainty of Mortgage Title*, 63 Duke L.J. 637 (2013); Elizabeth Renuart, *Uneasy Intersections, The Right to Foreclose and the U.C.C.*, 48 Wake Forest L. Rev. 1205 (2013). Enforcement of §1692f(6) as written to debt collectors conducting nonjudicial foreclosures

promotes reliable property transfers and dependable land records.

Without reference to these concerns, the Tenth Circuit rejected any role for §1692f(6) in Colorado foreclosures. 879 F.3d at 1224 n.4. In the court's view, the McCarthy firm's client, Wells Fargo, could never be accused of conducting a foreclosure sale without authority. This was because Wells Fargo did not hold title to the property and was not trying to get possession of the property. Instead, according to the court,"[i]it is the *public trustee* who holds the deed of trust and sells the property." *Id.* (emphasis in original). Wells Fargo thus had "no present right to possession of the property nor could they take possession of the property." *Id.* The gist seems to be that, because McCarthy did not purport to represent anyone who had an interest in the property, the firm could not plausibly be accused of trying to take the property without authority.

There are many errors in this analysis. To begin with, the Colorado public trustee does not hold title to a property through a deed of trust. Colorado law expressly prohibits such a transaction. Colo. Rev. Stat. §38-35-117 (deed of trust creates lien, cannot place title in trustee).[20] In conducting a foreclosure, McCarthy represents the "Holder of Evidence of Debt." Colo. Rev. Stat. §§38-38-101, 38-38-102.5. The holder of the note automatically holds title to the deed of trust. RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) §5.4(a) (1997). In order to foreclose, McCarthy must represent repeatedly in

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[20] In property law parlance, Colorado follows the "lien theory" as opposed to the "title theory" of mortgages. RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 4.1 (1997).

documents it serves on the borrower and submits to the public trustee and the court that it represents the holder of the note secured by the deed of trust. (Ex. 19, 20). Colo. Rev. Stat. §§38-38-101(2), (4), 38-38-105, 38-38-106; Colo. R. Civ. P. 120(a)(1).

After the public auction sale, the trustee executes a foreclosure deed and other documents that convey title to the sale purchaser. Colo. Rev. Stat. §§38-38-401, 38-38-405, 38-38-501 to 38-38-504. However, in this process the trustee, like a sheriff or private auctioneer, does not take title to or obtain possession of the property for itself. The Tenth's Circuit's analysis completely ignores the fact that the law firm *directs* the trustee in all activities the trustee performs. The court essentially construed the relationship backwards. In the court's view the trustee appears to be an independent actor who decides when and how to foreclose, while the law firm sits by passively. In reality, the law firm tells the trustee when to start the foreclosure, how much to demand, when to stop the foreclosure, and when to go ahead. The scope of the law firm's activities give it ample opportunity to violate §1692f(6).

CONCLUSION

For the reasons set forth above, the ruling of the Tenth Circuit should be reversed.

Respectfully submitted,

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Dated: September 17, 2018

No. 17-1307

In The
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DENNIS OBDUSKEY,

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v.

McCARTHY & HOLTHUS, LLP, *ET AL.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF NATIONAL CREDITORS BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

The National Creditors Bar Association™ ("NCBA") is a nationwide, not-for-profit bar association of attorneys who represent creditors in all areas of creditors rights law.[1] Its members include over 500 law firms, all of whom must meet association standards designed to ensure experience and professionalism. Members are also guided by the NCBA's code of ethics, which imposes an obligation of self-discipline beyond the requirements of applicable laws, regulations, professional codes and rules of professional conduct.[2]

Members of the NCBA are regularly involved in the lawful collection of past-due consumer debts. For this reason, NCBA members must interpret and comply with the often-unsettled requirements of applicable federal law, principally the Fair Debt Collection Practices Act ("FDCPA" or "Act"), Pub. L. No. 95-109, 91 Stat. 874 (1977). Members of the NCBA have a strong interest in ensuring that the Act is interpreted and applied in a way that allows collection attorneys to execute their ethical duty to advance their clients' legitimate interests – within the bounds of existing law – without constantly exposing themselves to substantial

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae or its counsel made a monetary contribution to the preparation or submission of this brief. Consent to the filing of this brief by the parties was filed on August 8, 2018 and on September 4, 2018.

[2] The NCBA was formerly known as the National Association of Retail Collection Attorneys ("NARCA").

personal liability. The NCBA has participated as amicus curiae in other cases involving the interpretation or application of the Act. *See, e.g.*, *Marx v. General Revenue Corp.*, 568 U.S. 2 (2013); *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573 (2010); *Heintz v. Jenkins*, 514 U.S. 291 (1995); *Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926 (9th Cir. 2007).

The NCBA is the only national bar association dedicated solely to the needs of collection attorneys. A reversal of the Tenth Circuit's ruling would erroneously and unfairly expose the attorney and law firm members of the NCBA, and many creditor clients of those members, to individual and class action claims under the FDCPA. The NCBA thus has a direct interest in this litigation, and it has authorized the filing of this brief.[3]

SUMMARY OF ARGUMENT

The NCBA urges this Court to affirm the Tenth Circuit's opinion. In doing so, the NCBA asks this Court to adopt the reasoning of the circuit courts that have held that a communication does not constitute "debt collection" under the FDCPA unless it seeks

[3] NCBA does not take the position that the FDCPA can never apply to its members. Rather, NCBA submits this brief asking the Court to clarify that foreclosure activity should not be considered "debt collection" under the FDCPA if it is not seeking payment of money from a consumer.

money from a consumer. This will allow the Court to create a bright line rule and provide critical guidance to NCBA attorneys and other collectors who seek to comply with the FDCPA each day.

Interpreting the FDCPA in the manner urged by the NCBA is consistent with the federalism concerns this Court expressed in *Sheriff v. Gillie*, 136 S. Ct. 1594 (2016). There, the Court observed that the FDCPA, like any federal statute, should not be interpreted in a manner that interferes with state law on a matter essential to a state's interests, unless Congress clearly intended to displace that law. The regulation of foreclosures is clearly a matter of essential state concern and grafting the requirements of the FDCPA on top of the foreclosure procedures enacted by the states creates numerous unintended conflicts, thereby improperly placing attorneys and their creditor clients at risk. There is no indication that Congress intended to displace state foreclosure laws when it enacted the FDCPA.

Finally, a ruling from this Court affirming the Tenth Circuit will help put an end to the "cottage industry" of FDCPA litigation filed by consumer attorneys against lawyers who represent secured creditors. Attorneys who are ethically representing their clients' interests by following state law procedures, like the members of the NCBA, should not have to face the chilling effect of strict liability under a federal statute, statutory penalties, and exposure to attorney's fee awards. The FDCPA can and should be read

consistently with state foreclosure laws. The ruling of the Tenth Circuit should be affirmed.

ARGUMENT

When Affirming The Decision Of The Tenth Circuit, This Court Should Clarify That A Collector's Communication Is Not "Debt Collection" Subject To The FDCPA Unless It Seeks Money From A Consumer

Although the FDCPA prohibits debt collectors from engaging in a broad range of unfair and misleading debt collection practices, *see* 15 U.S.C. §§ 1692b-1692h, the statute does not define the term "debt collection," *see id.* at § 1692(a) (referring to "abundant evidence of" improper "debt collection practices" and observing that certain "debt collection practices" can cause undesired effects); *id.* at § 1692a (defining certain terms, but not defining "debt collection"). The circuit courts have reached different conclusions about whether foreclosure activity is, or is not, "debt collection," thereby complicating the compliance obligations of the NCBA's members and other practitioners. *See, e.g.*, *Glazer v. Chase Home Fin. LLC*, 704 F.3d 453, 460 (6th Cir. 2013) ("Unfortunately, the FDCPA does not define 'debt collection,' and its definition of 'debt collector' sheds little light, for it speaks in terms of debt collection.") (citations omitted); *Gburek v. Litton Loan Serv. LP*, 614 F.3d 380, 384 (7th Cir. 2010) ("Neither this circuit nor any other has established a bright-line rule for determining whether a communication from a debt collector

was made in connection with the collection of any debt.").

The Ninth Circuit, and the Tenth Circuit in this case, have correctly held that an entity is not a "debt collector" engaged in "debt collection" under the FDCPA unless the challenged communication sought to obtain money from a consumer. *See Ho v. ReconTrust Co. NA*, 858 F.3d 568, 571-74 (9th Cir. 2017) (mailing debtor notice of default and notice of sale, which threatened foreclosure, was not attempt to collect money from debtor, and thus was not "debt collection" under FDCPA; "The notices at issue in our case didn't request payment from Ho."); *Obduskey v. Wells Fargo*, 879 F.3d 1216, 1221 (10th Cir.) (following *Ho*; "Because enforcing a security interest is not an attempt to collect money from the debtor, and the consumer has no 'obligation . . . to pay money,' non-judicial foreclosure is not covered under FDCPA") (citations omitted), *cert. granted*, 138 S. Ct. 2710 (2018).[4]

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[4] *But see McNair v. Maxwell & Morgan PC*, 893 F.3d 680, 683-84 (9th Cir. 2018) (*praecipe* and writ of special execution filed with clerk of court violated FDCPA, despite fact that they were never served on plaintiff and did not make demand for payment of money); *Mashiri v. Epsten Grinnell & Howell*, 845 F.3d 984, 989 (9th Cir. 2017) (law firm's notice advising that "failure to pay your assessment" would result in recording of lien was demand for payment of money subject to FDCPA). Other circuits have held that a communication may constitute "debt collection" under the FDCPA, even where there is no attempt to obtain payment of money from the consumer. *See McCray v. Federal Home Loan Mortg. Corp.*, 839 F.3d 354, 360 (4th Cir. 2016) ("nothing in [the] language [of the FDCPA] *requires* that a debt collector's misrepresentation [or other violative acts] be made as part of an *express demand for*

The decision of the Tenth Circuit should be affirmed. The NCBA urges the Court to clarify that communications that do not seek money from the debtor are not subject to the FDCPA. It should not matter whether a communication is made in connection with non-judicial foreclosure proceedings, or judicial foreclosure proceedings, or in some other context. Nor should it matter if the communication is made by a lawyer or other entity that does, or does not, fit the general definition of a "debt collector" under the FDCPA. If there is no attempt to get the debtor's money, the Act should not apply.

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payment or even as part of an action designed to induce the debtor to pay.") (emphasis in original, citation omitted); *Glazer*, 704 F.3d at 461 (FDCPA applied to judicial foreclosure complaint, despite absence of any allegation that it made demand for payment of money on debtor: "Thus, if the purpose of an activity taken in relation to a debt is to 'obtain payment' of the debt, the activity is properly considered debt collection."); *Gburek*, 614 F.3d at 386 (letter offering to discuss "foreclosure alternatives" was attempt to collect debt: "Though it did not explicitly ask for payment, it was an offer to discuss Gburek's repayment options, which qualifies as a communication in connection with an attempt to collect a debt."); *Kaltenbach v. Richards*, 464 F.3d 524, 526-28 (5th Cir. 2006) (attorney who filed foreclosure action may be "debt collector" under FDCPA, despite absence of any allegation that attorney made demand for payment of money).

The Federalism Concerns This Court Expressed In *Sheriff v. Gillie* Counsel In Favor Of Affirming The Decision Of The Tenth Circuit

In *Sheriff v. Gillie*, the Court observed that the FDCPA should not be interpreted in a manner that interferes with state law, unless Congress clearly intended to displace that law. *See* 136 S. Ct. 1594, 1602 (2016).[5] The reasoning employed by the Court in *Gillie* applies here as well.

At issue in *Gillie* was whether a law firm retained by the Ohio Attorney General had used a false or misleading letterhead when collecting debts owed to the State. *See Gillie*, 136 S. Ct. at 1600-02. The Attorney General had appointed the firm as "special counsel" for the State pursuant to Ohio law, and had required the firm to use the Attorney General's letterhead. *Id.* In a unanimous opinion, the Court held the firm's use of the Attorney General's letterhead was *not* false or misleading under the Act. *Id.* at 1598, 1600-02.[6] In doing so,

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[5] *See also Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) ("[i]n areas of traditional state regulation . . . a federal statute has not supplanted a state law unless Congress has made such an intention 'clear and manifest' "); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) ("To displace traditional state regulation in such a manner, the federal statutory purposes must be 'clear and manifest.' ").

[6] Specifically, this Court held that "use of the letterhead accurately convey[ed] that special counsel, in seeking to collect debts owed to the State, d[id] so on behalf of, and as instructed by, the Attorney General." *Id.* at 1598.

the Court recognized the "federalism concern" that a contrary result would create:

> Ohio's enforcement of its civil code – by collecting money owed to it – [is] a core sovereign function. [citation omitted]. Ohio's Attorney General has chosen to appoint special counsel to assist him in fulfilling this obligation to collect the State's debts, and he has instructed his appointees to use his letterhead when acting on his behalf. There is no cause, in this case, to construe federal law in a manner that interferes with States' arrangements for conducting their own governments.

Id.

The present case presents a far more compelling "federalism concern" than the one at play in *Gillie*. It cannot be seriously disputed that the regulation of foreclosure activity (be it judicial or non-judicial) is a "core sovereign function" of the states. *See* Respondent's Brief at pp. 39-41.[7] Indeed, this Court has recognized the "essential state interest" states have in regulating the enforcement of security interests in property:

> It is beyond question that an essential state interest is at issue here: We have said that 'the general welfare of society is involved in the security of the titles to real estate' and the power to ensure that security 'inheres in the

[7] Petitioner does not dispute this point in any coherent way and in fact assumes that foreclosure is a "traditional state interest." *See* Petitioner's Brief at p. 26.

> very nature of [state] government.' [citation, brackets in original]. Nor is there any doubt that the interpretation urged by petitioner would have a profound effect upon that interest: The title of every piece of realty purchased at foreclosure would be under a federally created cloud.

BFP, 511 U.S. at 544 (refusing to interpret Bankruptcy Code in manner that would disrupt state foreclosure schemes); *see also Ho*, 858 F.3d at 576 ("When one interpretation of an ambiguous federal statute would create a conflict with state foreclosure law and another interpretation would not, respect for our federal system counsels in favor of the latter."); *Mahmoud v. De Moss Owners Assoc. Inc.*, 865 F.3d 322, 334 (5th Cir. 2017) ("To construe §§ 1692e and f the way Mahmoud and Jackson request would interfere with Texas's carefully articulated arrangements for conducting nonjudicial real property foreclosures by creating causes of action where state law finds no wrongful foreclosure.").

Here, as in *Gillie*, interpreting the FDCPA in the manner urged by Petitioner will substantially interfere with the operation of state law on a matter of essential state interest. *See* Respondent's Brief at pp. 42-44. Unlike *Gillie*, however, the disruption will not be limited to Ohio; rather, it will affect the foreclosure schemes of nearly every state, and it will impact

attorneys in nearly every state, such as NCBA members, that practice in the foreclosure area.[8]

Actual and potential conflicts between the FDCPA and state foreclosure laws abound. For example, states frequently require that notice of a foreclosure sale be published in newspapers or other public media prior to sale. *See, e.g.*, Mich. Comp. Laws Ann. § 600.3208; Cal. Civ. Code § 2924f(b)(2); N.C. Gen. Stat. § 45-21.17(1)-(2); R.I. Gen. Laws § 34-27-4(a); Wash. Rev. Code § 61.24.040(5); Alaska Stat. § 34.20.080(a); Or. Rev. Stat. § 86.774(2)(a). These state statutes also frequently require that notice of the foreclosure be sent directly to various third parties. *See, e.g.*, Cal. Civ. Code § 2924b(c)(1)-(2); Wash. Rev. Code § 61.24.040(1)(b); N.C. Gen. Stat. §§ 45-21.16(b), 45-21.17(4); Alaska

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[8] Petitioner contends that "[i]t makes little sense to permanently construe a federal statute . . . to avoid a conflict with a handful of Colorado regulations that could change at any time." Petitioner's Brief at p. 28. This argument ignores *Gillie*, where the Court refused to construe the FDCPA in a manner that would conflict with the law of a single state (Ohio). *See Gillie*, 136 S. Ct. at 1600-02. Regardless, as discussed by Respondent and herein, the Court should not construe the FDCPA in a manner that would conflict with the carefully-crafted foreclosure laws of numerous states (not just Colorado's), which govern an area that is indisputably a core state concern. *See* https://www.realtytrac.com/real-estate-guides/foreclosure-laws/ (thirty-one states permit non-judicial foreclosure) (last visited Nov. 7, 2018) ("realtytrac"); *see also* Andra C. Ghent & Marianna Kudlyak, *Recourse and Residential Mortgage Default: Theory and Evidence from U.S. States*, Federal Reserve Bank of Richmond Working Paper No. 09-10R, 32 (Table 1), 44-55 (Appendix A) (June 10, 2010), *available at* https://www.richmondfed.org/~/media/richmondfedorg/publications/research/working_papers/2009/pdf/wp09-10r/pdf (summarizing state foreclosure laws) ("Ghent & Kudlyak").

Stat. § 34.20.070(c). The FDCPA, however, prohibits collectors from communicating with any third parties "in connection with the collection of any debt" except in narrow circumstances not applicable here. 15 U.S.C. § 1692c(b).[9]

Similarly, many states require that certain foreclosure notices be provided directly to debtors, even if they are represented by counsel. *See, e.g.*, N.C. Gen. Stat. § 45-21.16(a); Or. Rev. Stat. § 86.774(1)(a); Wash. Rev. Code § 61.24.030(8); Mich. Comp. Laws Ann. § 600.3208. The FDCPA, however, prohibits collectors from communicating with debtors who are represented by counsel "in connection with the collection of any debt" except in very narrow circumstances, none of which apply here. 15 U.S.C. § 1692c(a)(2).

Petitioner has not pointed to anything showing a "clear and manifest" intent of Congress in passing the FDCPA to "displace" state foreclosure laws. *See BFP*, 511 U.S. at 544. Instead, Petitioner contends this disruption is permissible. *See* Petitioner's Brief at pp. 26-28. Although Respondent has more than sufficiently

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[9] Some conflicts exist with state laws regulating judicial foreclosure. For example, in North Dakota, before a foreclosure action is initiated in court, a notice of foreclosure must be served on the owner of the property. *See* N.D. Cent. Code § 32-19-20. If the foreclosing entity (or its counsel) are unable to serve the notice personally or by mail, the notice is served by publication. *See Farm Credit Bank of St. Paul v. Obrigewitch*, 462 N.W.2d 113, 114 (N.D. 1990). Judicial foreclosure remains the sole mechanism of foreclosing on real property in the nineteen states that do not permit non-judicial foreclosure. *See* realtytrac (eighteen states permit judicial foreclosure only); *see also* Ghent & Kudlyak at 32 (Table 1), 44-55 (Appendix A).

addressed these arguments, the NCBA believes that one merits further discussion.

Petitioner contends that the "venue provision" of the FDCPA (section 1692i) covers foreclosures. *See* Petitioner's Brief at p. 26 (emphasis in original).[10] Petitioner ignores the plain language of the statute, because section 1692i clearly does not apply to non-judicial foreclosure proceedings, as they are not "legal actions."

Nor does section 1692i "cover" all judicial foreclosure actions. To the contrary, section 1692i(a) applies only to those "legal action[s]" that are filed "*on a debt*" and that are also "*against any consumer.*" 15 U.S.C. § 1692i(a) (emphasis added). A judicial foreclosure action that seeks *only* to foreclose on an interest in property, and does not seek money from the consumer, is neither an action "on a debt," nor is it an action "against a consumer." To the contrary, it is an *in rem* action against the property. *Cf. Cohen v. Rosicki, Rosicki & Assocs. PC*, 897 F.3d 75, 84 (2d Cir. 2018) (FDCPA applied to foreclosure complaint despite fact that "a mortgage foreclosure action is an *in rem* action in equity rather than an *in personam* action at law.").[11]

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[10] His contention that "[a]ll sides further agree that the FDCPA covers *judicial* foreclosures" misstates Respondent's position as stated in its brief. *Id.*

[11] In an analogous context, courts have repeatedly held that a garnishment action is not an action "against" a consumer within the meaning of section 1692i, as it is an action against the garnishee (generally, the consumer's employer). *See, e.g., Ray v. McCullough Payne & Haan LLC*, 838 F.3d 1107, 1111 (11th Cir. 2016); *Jackson v. Blitt & Gaines PC*, 833 F.3d 860, 864 (7th Cir.

Thus, contrary to Petitioner's argument, nothing in the language of section 1692i suggests that Congress intended the venue provision to apply to foreclosure activity (be it judicial or non-judicial) that seeks *only* to enforce security interests in property.

In addition, although *Ho* involved non-judicial foreclosure, the NCBA submits that its logic and reasoning should also apply in the context of judicial foreclosure if the foreclosing party seeks only to enforce its security interest and does not seek to recover money from the property owner. *See Ho*, 858 F.3d at 571-72; *see also, e.g.*, *Baylon v. Wells Fargo Bank NA*, 2015 WL 11111348, at *7-8 (D.N.M. Oct. 30, 2015) (judicial foreclosure action seeking only to enforce security interest, and not seeking deficiency judgment, did not constitute "debt collection" under FDCPA); *Doughty v. Holder*, 2014 WL 220832, at *3-5 (E.D. Wash. Jan. 21, 2014) (distinguishing between "deficiency judgment" and "foreclosure judgment," explaining that latter "is for the purpose of enforcing the creditor's security interest through a foreclosure," while former "is not for the purpose of enforcing the security interest, but for seeking payment of funds. . . . It is an action to collect a debt[,]" concluding that "[s]o long as the foreclosure proceedings, be they non-judicial or judicial, involve no more than mere enforcement of security interests, the

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2016); *Hageman v. Barton*, 817 F.3d 611, 617-18 (8th Cir. 2016); *Smith v. Solomon & Solomon PC*, 714 F.3d 73, 74-76 (1st Cir. 2013); *Randall v. Maxwell & Morgan PC*, 321 F. Supp. 3d 978, 981-984 (D. Ariz. 2018); *Muhammad v. Reese Law Group*, 2017 WL 4557194, at *7 (S.D. Cal. Oct. 12, 2017).

FDCPA does not apply[,]" and holding that "judicial foreclosure complaints filed by [defendants] sought only to enforce security interests via obtainment of a foreclosure judgment to be followed by a foreclosure sale" and thus were not subject to FDCPA). In other words, the substance of the action, not the form, is what matters.

As in *Gillie*, this Court should refuse to interpret the FDCPA in a manner that would displace carefully-crafted state foreclosure laws. Petitioner all but concedes this disruption will occur if his argument is adopted. The same "federalism concern[s]" apply to both judicial and non-judicial foreclosure. Both methods of foreclosure seek to enforce a secured interest in property; they do not seek payment of money from the debtor. As a result, this Court should hold that the FDCPA does not apply, regardless of which method is employed, so long as no demand for payment of money is made upon the debtor.

Affirming The Decision Of The Tenth Circuit Will Help Put An End To The Troubling Trend Of Consumer Attorneys Suing NCBA Members Simply For Complying With State Foreclosure Law

NCBA members (*i.e.*, licensed attorneys) who pursue foreclosure remedies on behalf of their creditor clients are faced with a Hobson's choice: 1) they can comply strictly with state foreclosure laws, putting themselves (and possibly their clients) at risk of being

sued under the FDCPA, or 2) they can seek to avoid FDCPA exposure by failing to strictly comply with state foreclosure laws, thereby putting their clients' security rights at risk (and themselves at risk for not vigorously pursuing their client's interest). NCBA members should not be forced to choose between complying with state law and their ethical obligation of zealous advocacy or with the FDCPA. This Court should put an end to this untenable situation by affirming the decision of the Tenth Circuit.

Consumer attorneys representing consumers routinely file lawsuits that seek to capitalize on direct conflicts between state foreclosure law and the FDCPA. *See, e.g.*, *Cohen*, 897 F.3d at 86 (rejecting FDCPA claim where foreclosure notices were not materially misleading and correctly identified name of creditor consistent with requirements of New York foreclosure statute); *Salewske v. Trott & Trott PC*, 2017 WL 2888998, at **2-8 (E.D. Mich. July 7, 2017) (allowing FDCPA claims based on notice of foreclosure sale required by state law to proceed); *McDermott v. Marcus, Errico, Emmer & Brooks PC*, 911 F. Supp. 2d 1, 71 (D. Mass. Nov. 20, 2012) (rejecting defendant's argument that sending notice to mortgagee as required by Massachusetts law was permissible under § 1692c(b) of the FDCPA: "the requirements of a state statute do not constitute the prior consent of a debtor given directly to a debt collector."); *Warran v. Smith Debnam Narron Drake Saintsing & Myers LLP*, 2011 WL 10858230, at *4 (E.D.N.C. Apr. 19, 2011) (rejecting claim that letter

violated North Carolina's foreclosure statute and therefore violated FDCPA).

In *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, the Court held that the bona fide error defense under the FDCPA does not apply to a violation resulting from a collector's mistaken interpretation of the legal requirements of the Act. *See* 559 U.S. at 604-05. The dissent explained that the Court's holding

> gives new impetus to the already troubling dynamic of allowing certain actors in the system to spin even good-faith, technical violations of federal law into lucrative litigation, if not for themselves then for the attorneys who conceive of the suit.

Id. at 617 (Kennedy, J., dissenting).[12] If the Court reverses the decision of the Tenth Circuit here, the dynamic will be far more troubling than in *Jerman*. As discussed above, thousands of licensed attorneys will be unable to conduct lawful foreclosures on behalf their clients without being put at risk of violating federal law. NCBA urges the Court to affirm.

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[12] The *Jerman* dissent cited *Federal Home Loan Mortgage Corp. v. Lamar*, in which the Sixth Circuit described the "cottage industry" of litigation that has arisen out of consumers and their attorneys suing under the FDCPA based on technical violations of the statute. *See* 503 F.3d 504, 513 (6th Cir. 2007). Not surprisingly, the *Lamar* case stems from an attorney's attempt to carry out a foreclosure for its lender client. *Id.* at 506-07.

CONCLUSION

For all of the foregoing reasons, the NCBA respectfully submits that the decision of the Tenth Circuit should be affirmed.

Dated: November 13, 2018

Respectfully submitted,

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No. 17-1307

IN THE

Supreme Court of the United States

DENNIS OBDUSKEY,

Petitioner,

v.

MCCARTHY & HOLTHUS, LLP, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF AMICI CURIAE UNITED TRUSTEES ASSOCIATION; ARIZONA TRUSTEE ASSOCIATION; CALIFORNIA MORTGAGE ASSOCIATION AND CALIFORNIA MORTGAGE BANKERS ASSOCIATION IN SUPPORT OF RESPONDENTS

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November 14, 2018

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF AMICI CURIAE[1]

This amicus brief is submitted on behalf of the following organizations, whose members are deeply involved in the administration of consumer loans, and who are vitally interested in the application of the federal Fair Debt Collection Practices Act (15 U.S.C. §§ 1692 et seq., the "FDCPA") to their activities, including those relating to foreclosure.

I. THE UNITED TRUSTEES ASSOCIATION

The United Trustee's Association ("UTA") is a national, non-profit public benefit corporation whose members include trustees who act under deeds of trust secured by real property in California and other states where non-judicial foreclosure is authorized by state law, as well as members working in industries that provide support services in the non-judicial foreclosure process (e.g., foreclosure agents, lenders, legal newspapers, title companies, posting services and attorneys). UTA's trustee members provide reconveyances (when secured loans are satisfied) and non-judicial foreclosure services (after default) for literally all lenders in the California real estate market.

II. THE ARIZONA TRUSTEE ASSOCIATION

The Arizona Trustee Association ("ATA") is an Arizona statewide non-profit organization that was founded in 1988 to educate its members on real estate foreclosure matters, monitor legislation that may impact the trustee sale process and formulate legislation

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[1] This brief was not authored in whole or in part by counsel for any party to this appeal. No one other than the amici identified herein made any monetary contribution to the preparation or submission of this brief. Counsel for Petitioner and Respondent have filed letters of blanket consent to the filing of amicus briefs.

designed to "foster, promote and improve the quality of trust deed service in general" (Arizona Trustee Association, Mission, available at http://www.arizona trusteeassociation.commission).

The ATA's membership includes attorneys, title companies, escrow companies, financial institutions, loan servicing companies, investors, independent foreclosure companies, newspapers and posting, publication and auction companies. In short, the members comprise the array of individuals and companies involved in the service, support and completion of trustee sales in Arizona.

III. THE CALIFORNIA MORTGAGE ASSOCIATION

The California Mortgage Association ("CMA") is a non-profit trade association of lenders and brokers. Its members include individuals as well as entities that make, arrange, sell, or service privately funded real estate loans secured by deeds of trust on property in California. The respective duties and obligations of loan servicers and trustees under a deed of trust are a matter of great concern to CMA members.

IV. THE CALIFORNIA MORTGAGE BANKERS ASSOCIATION

The California Mortgage Bankers Association is the non-profit trade association for mortgage bankers doing business in California. The Association's membership consists of approximately three hundred (300) companies representing a full spectrum of residential and commercial lenders, servicers, brokers, and a broad range of industry service providers. Almost all the Association's members are based in California, but their business activities and operations often extend into other states and, in some instances, throughout

the entire nation. Based on historical data from the Mortgage Bankers Association of America, nearly twenty percent (20%) of the residential mortgage loans in the United States are originated and underwritten in California.

SUMMARY OF ARGUMENT

Petitioner's fundamental argument is that everyone who participates in a foreclosure must be a "debt collector" within the meaning of the Fair Debt Collection Practices Act, simply because the pendency of a foreclosure will motivate some borrowers to pay the secured debt. This facile conclusion is urged upon the Court without really examining what non-judicial foreclosure consists of in the states which gave rise to the Circuit decisions disagreed with by Petitioner. This amicus brief is submitted on behalf of independent foreclosure trustees in several western states including California, the state in which more home mortgage loans originate than any other.[2] Using the specifics of California's non-judicial foreclosure system by way of example, this brief is intended to call the Court's attention to the features of non-judicial foreclosure which do not comport with the conclusion urged by Petitioner that non-judicial foreclosure is debt collection.

In the wake of the mortgage crisis, California and many other states enacted foreclosure prevention schemes which include disclosures, grace periods and other protections which govern the interaction of lend-

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[2] 2017 NMLS Mortgage Industry Report, Released May 24, 2018 Conference of State Bank Supervisors pp. 14-15. Available at https://mortgage.nationwidelicensingsystem.org/about/Reports/2017%20Mortgage%20Report.pdf

ers and loan servicers with consumers. These protections are specifically focused on foreclosure, are far more extensive than those required under the FDCPA, and have proven effective.

In California and nineteen other states, most but not all located west of the Mississippi, deeds of trust, rather than mortgages, are the most common instrument used in financing home loans. Non-judicial foreclosures are processed by the trustee named in the deed of trust. In California the role of the trustee in actually foreclosing a deed of trust is limited to statutory procedures that require no contact with the borrower other than the mailing, posting and recording of prescribed notices to the borrower and to the public, and if necessary the conduct of an auction sale, issuance of a trustee's deed upon sale, and distribution of any cash proceeds. The role of the trustee, while it requires care and discretion, is strictly regulated, indeed scripted, as far as contact with the borrower is concerned.

The role of the trustee under California's non-judicial foreclosure statutes is limited to realizing upon real property collateral, as distinct from collecting the secured debt. California's "one form of action" law forbids a lender to sue a borrower on a debt which is secured by real property. Antideficiency statutes in effect in California and other western states forbid a lender from suing a borrower following the completion of a non-judicial foreclosure.

Applying the requirements of FDCPA to non-judicial foreclosure would create anomalies that could not be resolved even by amending state foreclosure statutes. For example, FDCPA forbids a debt collector to contact third parties. Yet one aim of foreclosure is

to obtain, for the benefit of all parties including the borrower, the maximum recovery from a foreclosure sale by encouraging competitive bidding through the use of published notices identifying the subject property and the amount secured.

ARGUMENT

I. CALIFORNIA'S COMPREHENSIVE, DETAILED FORECLOSURE STATUTES INCLUDE CONSUMER PROTECTIONS MORE FOCUSED AND EXTENSIVE THAN FDCPA

Beginning with the enactment of Civil Code section 2924 in 1933, the state of California has adopted, added to and refined a complex, detailed and restrictive set of statutes which govern non-judicial foreclosures under powers of sale contained in deeds of trust. Currently, Civil Code sections 2920 through 2924*l*, which cover the foreclosure process, contain over 36,000 words This comprehensive and extremely detailed system governs not only the mechanics of foreclosure, in which the trustee is involved, but also foreclosure prevention in which the lenders and loan servicers are involved. The role and responsibilities of a trustee under a California deed of trust are exhaustively laid out by statute.

In California, consumer protection relating to mortgage defaults applies before foreclosure may even be commenced. The "Homeowners Bill of Rights" ("HOBR")[3] was enacted for the purpose of ensuring that "as part

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[3] Calif. Civ. Code §§ 2923.5 – 2923.7, 2924.12, 2924.15 and related sections. Portion of HOBR which expired under sunset provisions have been reenacted, effective January 1, 2019. 2018 Cal. Legis. Serv. Ch. 404 (S.B. 818) (West); Cal. Civ. Code § 2923.7

of the non-judicial foreclosure process, borrowers are considered for, and have a meaningful opportunity to obtain, available loss mitigation options, if any, offered by or through the borrower's mortgage servicer, such as loan modifications or other alternatives to foreclosure." Calif. Civ. Code § 2923.4.

Under HOBR, a lender or loan servicer may not direct the trustee to begin a foreclosure until at least thirty days after initial contact is made or after having satisfied due diligence requirements, which include sending a first-class letter, attempting to call the borrower by telephone at least three times at different hours and on different days, and then sending a certified letter.[4]

Mortgage servicers are restricted from advancing the foreclosure process if the homeowner is working on securing a loan modification.[5] HOBR guarantees a single point of contact with the lender and loan servicer so that they will deal with a person or team who knows the facts of their case and has responsibility for their application for a loan modification.[6]

The additional notices and grace periods required by HOBR apply to the administration of a loan by mortgage lenders and loan servicers, and not to trustees under trust deeds, whose role continues to be strictly confined to processing the foreclosure itself.

If a lender or loan servicer is permitted to commence a foreclosure it must direct the trustee under the deed of trust to mail, record and post a series of two notices, the content of which is prescribed in detail by statute.

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[4] Cal. Civ. Code § 2923.5(e).

[5] Cal. Civ. Code § 2914.11(a); 2920.5(c).

[6] Cal. Civ. Code § 2923.7.

The first such notice, called the "Notice of Default" must be accompanied by a "Summary of Key Information" in the form of Appendix 1 to this brief, translated into Spanish, Chinese, Tagalog, Vietnamese and Korean.[7]

After a Notice of Default is recorded and served in the prescribed manner, the trustee under a California deed of trust can take no action for the next three months. After that statutory waiting period has expired the lender or loan servicer may direct the trustee to prepare a Notice of Trustee's Sale to be recorded, served by certified mail, posted on the property and published in a newspaper. An additional waiting period of at least twenty days ensues before a foreclosure sale may actually be conducted. The Notice of Trustee's Sale is required to be accompanied by another "Summary of Key Information, in the form of Appendix 2.[8]

All of these procedures are overlaid by Regulation X promulgated by the Consumer Finance Protection Board as authorized by the Real Estate Settlement Procedures Act (RESPA).[9] CFPB's lengthy, detailed rule on loss mitigation procedures[10] governs the servicing of defaulted "federally related" mortgage loans.[11] This loss mitigation rule imposes a waiting period of 120 days after default before a foreclosure may be commenced. It also governs in detail the handling of applications for mortgage loan modifications.

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[7] Cal. Civ. Code § 2923.3(c).

[8] Cal. Civ. Code § 2923.3(d)

[9] 12 U.S.C. §§ 2601 et seq.

[10] 12 CFR §1024.41

[11] 12 CFR § 1024.2

California's foreclosure statutes provide practical, meaningful and effective consumer protections because they are drafted specifically to address mortgage loan defaults. A paper prepared jointly by Prof. Stuart Gabriel of UCLA, Prof. Chandler Lutz of the Copenhagen Business School, and Matteo Iacoviello Chief, Division of the International Finance of the Board of Governors of the Federal Reserve System, concluded that California's consumer – oriented foreclosure laws "prevented 124,000 California foreclosures, increased house prices by 6.2 percent, and created $310 billion of housing wealth [and were] highly effective in mitigating foreclosures and stabilizing housing markets."[12]

Imposing the comparatively sparse and simplistic requirements of FDCPA would add nothing to the protections offered by these laws except confusion. And as explained below the unnecessary imposition of FDCPA will quite literally disable beyond repair the system of non-judicial foreclosure.

II. NON-JUDICIAL FORECLOSURE BENEFITS CONSUMERS

Petitioner is asking the Court to impose unnecessary and ill-fitting regulations which will cripple the non-judicial foreclosure process, as explained below. That incompatibility is disregarded by Petitioner, and by amici filing briefs in support of Petitioner, perhaps for the reason that they are hostile to the entire system of non-judicial foreclosure. For example, amicus National Consumer Law Center has published a paper

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[12] Gabriel, Iacoviello & Lutz, "A Crisis of Missed Opportunities? Foreclosure Costs and Mortgage Modification During the Great Recession," 2017 Available at https://lusk.usc.edu/sites/default/files/attachments/Stuart_Gabriel.pdf

advocating court involvement in all foreclosures.[13] That view is far outside the mainstream. The vast majority of foreclosures are conducted non-judicially in those 33 states in which a non-judicial procedure is available by statute.

The National Conference of Commissioners on Uniform State Laws ("NCCULA") has proposed a Uniform Non-judicial Foreclosure Act ("UNFA") for adoption in all states. In its Summary of the proposed uniform act, NCCULA stated:[14]

> In the great majority of foreclosures, judicial involvement is unnecessary because there is no dispute between the debtor and creditor. Using the time of judges and the machinery of the courts to conduct routine foreclosures is often a misallocation of public funds as well as a waste of the secured creditor's resources. The delays and inefficiency associated with foreclosure by judicial action are costly. They increase the risk of vandalism, fire loss, depreciation, damage, and waste. The resulting costs raise the prices of private mortgages and erodes the economic value of government subsidy program involving mortgages.

By federal statute, non-judicial foreclosure is made available in all states under title 12, chapter 38A, United States Code,(12 U.S.C. §§ 3751 et seq) as to

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[13] Rao & Walsh, National Consumer Law Center, Inc., "Foreclosing a Dream, State Laws Deprive Homeowners of Basic Protections" (2009) https://www.nclc.org/images/pdf/foreclosure_mortgage/state_laws/foreclosing-dream-report.pdf

[14] NCCULA "Non-judicial Foreclosure Act Summary" (2018) Available at http://www.uniformlaws.org/ActSummary.aspx?title=Non-judicial%20Foreclosure%20Act

mortgages held by the United States Department Housing and Urban Development. Title 12 section 3751(a) cites essentially the same reasons stated by the NCCULA in the above quoted summary.

A working paper[15] published by the Federal Reserve Bank of Philadelphia in March, 2015, concluded in part:

> [T]he longer timelines associated with judicial intervention in the foreclosure process have led to neither more cures nor more modifications, just more persistently delinquent borrowers. Third, there are other potentially large costs in terms of slower house price recovery and less "boomerang borrowing" by post-foreclosure consumers in judicial states, greater house price depreciation from nearby foreclosures, and negative neighborhood-level effects caused by foreclosure delays. In short, judicial review of foreclosures imposes large costs with few, if any, offsetting benefits.

The non-judicial foreclosure system, now in effect in a majority of states, and adopted by Congress for the foreclosure of HUD mortgages in all states, is not an enemy of consumers. It benefits consumers. The decision as to whether to adopt that system, and how, is a question that is properly left to each state. No benefit to consumers would accrue from the imposition

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[15] Cordell, Larry and Lambie-Hanson, Lauren, A Cost-Benefit Analysis of Judicial Foreclosure Delay and a Preliminary Look at New Mortgage Servicing Rules (March 1, 2015). FRB of Philadelphia Working Paper No. 15-14. p. 3. Available at https://philadelphiafed.org/-/media/research-and-data/publications/working-papers/2015/wp15-14.pdf

of the ill-fitting rules of FDCPA, as advocated by Petitioner. A detriment to consumers would result were the non-judicial foreclosure system to be destroyed by the application of FDCPA as is urged by the Petitioner.

III. CALIFORNIA NON-JUDICIAL FORECLOSURE DOES NOT, AND LEGALLY CANNOT, INCLUDE COLLECTION OF THE SECURED DEBT BY THE TRUSTEE

Non-judicial foreclosure is about realizing upon the security for mortgage debts, and not about collecting money. In California, two statutes preclude a mortgage lender from collecting a mortgage debt except in the context of a judicial foreclosure. California Code of Civil Procedure section 726, part of the chapter governing judicial foreclosure, provides in part that "[t]here can be but one form of action for the recovery of any debt . . . secured by mortgage upon real property . . . .which action shall be in accordance with the provisions of this chapter." This is referred to as the "one action rule."[16] In California "[i]f the beneficiary seeks a deficiency judgment in excess of the value of the security, he is . . . limited to a foreclosure by judicial process rather than by operation of the power of sale under the deed of trust." *Pacific Valley Bank v. Schwenke,* 189 Cal. App. 3d 134, 140, 234 Cal. Rptr. 298, 301 (Ct. App. 1987). The lender "is not allowed to circumvent the statute by divesting himself of his security without the consent of the debtor." Id.

California Code of Civil Procedure section 580d provides that: "no deficiency shall be owed or collected, and no deficiency judgment shall be rendered for a deficiency on a note secured by a deed of trust or

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[16] Miller & Starr, 5 Cal. Real Est. § 13:194 (4th ed.)

mortgage. . . in any case in which the real property . . . has been sold by the mortgagee or trustee under power of sale contained in the mortgage or deed of trust." This statute is "a complete bar to a personal judgment on the debt once the trustee's sale is complete." Miller & Starr, 5 Cal. Real Est. § 13:259 (4th ed. 2018). Under this and similar anti-deficiency statutes adopted in other states[17] "foreclosure extinguishes the entire debt even if it results in a recovery of less than the amount of the debt." *Ho Vien-Phuong Thi Ho v. ReconTrust Co., NA*, 858 F.3d 568, 572 (9th Cir.), cert. denied sub nom. Ho v. ReconTrust Co., 138 S. Ct. 504, 199 L. Ed. 2d 385 (2017)

"The fundamental trade-off exacted from a secured creditor who obtains the expedited benefits of a non-judicial foreclosure and trustee's sale is the loss of the right to recover a deficiency judgment on the debt." Miller & Starr, 5 Cal. Real Est. § 13:194 (4th ed.). The Court in *Dreyfuss v. Union Bank of California,* 24 Cal. 4th 400, 411, 11 P.3d 383, 390 (2000) explained:

> Non-judicial foreclosure proceedings must be conducted by auction in a fair and open manner, with the property sold to the highest bidder . . . permitting the borrower, or anyone else, to participate in setting the price for the property. Most important, the borrower is relieved from any personal liability on the debt. (See *Roseleaf Corp. v. Chierighino* (1963) 59 Cal.2d 35, 42, 27 Cal.Rptr. 873, 378

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[17] Deficiency judgments after non-judicial foreclosure are barred in California as well as in Alaska, Alaska Stat. § 34.20.100; Oregon ORS. § 86.797 (formerly OR ST § 86.770); Washington (as to consumer loans) RCW § 61.24.100(1); and in Arizona as to property two and one-half acres or less limited to single one-family or a single two-family dwelling. ARS §§ 33-729(A) & 33-814(G)

> P.2d 97.) Thus, in the event of a default, the borrower stands to lose only such property as he or she specifically chose to place at risk, leaving the creditor to carry the burden of any additional loss in value if the amount of the debt exceeds the value of the assets pledged as security for the loan.

Petitioner can only argue that a non-judicial foreclosure amounts to an "indirect" attempt to collect the secured debt because the pendency of a foreclosure will motivate some borrowers to pay the secured debt. This is the same as arguing, for example, that adverse credit reporting is debt collection, even though furnishing information to a consumer reporting agency involves no contact at all with the consumer. Credit reporting is of course not debt collection, and neither is non-judicial foreclosure. Both processes should be, and now are, regulated by separate statutory systems with detailed provisions specific to their respective subjects.

IV. THE ROLE OF THE TRUSTEE IN CONDUCTING A NON-JUDICIAL FORECLOSURE IS STRICTLY DEFINED BY STATUTE

Trustees under deeds of trust are not free agents charged with collecting debts. Their function is to process foreclosures to realize upon collateral following specific statutory rules. For example, under California non-judicial foreclosure law, "[t]he scope and nature of the trustee's duties are exclusively defined by the deed of trust and the governing statutes." *Kachlon v. Markowitz,* 168 Cal. App. 4th 316, 335, 85 Cal. Rptr. 3d 532, 546 (2008). As the California Supreme Court explained in *I. E. Associates*

v. Safeco Title Ins. Co., 39 Cal. 3d 281, 288, 702 P.2d 596, 598 (1985):

> The non-judicial foreclosure statutes - an alternative to judicial foreclosure - reflect a carefully crafted balancing of the interests of beneficiaries, trustors, and trustees. Beneficiaries, of course, want quick and inexpensive recovery of amounts due under promissory notes in default. Trustors, on the other hand, need protection against the forfeiture of valuable property rights. Trustees, the middlemen, need to have clearly defined responsibilities to enable them to discharge their duties efficiently and to avoid embroiling the parties in time-consuming and costly litigation. In taking all of these concerns into account, the statutes strike an overall balance favoring the protection of trustors.

The two foreclosure notices which are mandated under California law, the Notice of Default and the Notice of Trustee's sale, consist of statutorily required language which does not involve the trustee in the collection of the secured debt. For example, the Notice of Default required by California Civil Code section 2924b(b)(1) includes the following:

> If you fail to make future payments on the loan, pay taxes on the property, provide insurance on the property, or pay other obligations as required in the note and deed of trust or mortgage, *the beneficiary or mortgagee* may insist that you do so in order to reinstate your account in good standing. In addition, the *beneficiary or mortgagee* may require as a condition to reinstatement that you provide reliable written evidence that

> you paid all senior liens, property taxes, and hazard insurance premiums.
>
> Upon your written request, *the beneficiary or mortgagee* will give you a written itemization of the entire amount you must pay. . . . However, you and your beneficiary or mortgagee may mutually agree in writing prior to the time the notice of sale is posted (which may not be earlier than the end of the three month period stated above) to, among other things, (1) provide additional time in which to cure the default . . . .[*italics* added]

Nothing in the statutory notice suggests that the trustee is collecting debts on behalf of the lender.

Because the activities of the trustee under a deed of trust are strictly limited by this detailed statutory scheme, the California legislature has seen fit to expressly exclude trustees from the definition of "debt collector" under the California analogue of the FDCPA, the Rosenthal Fair Debt Collection Practices Act, Civil Code sections 1788 et seq.[18] California state appellate courts called upon to determine whether trustees under deeds of trust are subject to FDCPA have also ruled that "giving notice of a foreclosure sale to a consumer as required by the Civil Code does not

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[18] The Rosenthal Act was adopted under the authority of FDCPA section 1692n, which provides that in effect that the FDCPA does not pre-empt state laws which provide protection greater than that provided under the FDCPA. Among other things, the Rosenthal Act requires more extensive warning notices than does the FDCPA (Cf. 15 U.S.C. § 1692e(11) & Calif. Civ. Code § 1812.700), and is not confined in its application to third party debt collectors. Calif. Civ. Code §1788.2(c). The exclusion of trustees under deeds of trust from the definition of "debt collector" is contained in Calif. Civ. Code § 1788.2(c).

constitute debt collection activity under the FDCPA." *Pfeifer v. Countrywide Home Loans, Inc.*, 211 Cal. App. 4th 1250, 1264, 150 Cal. Rptr. 3d 673 (2012). Accord, *Fonteno v. Wells Fargo Bank*, 228 Cal. App. 4th 1358, 1375, 176 Cal. Rptr. 3d 676, 690 (2014).

V. CASES RELIED UPON BY PETITIONER INVOLVE JUDICIAL FORECLOSURE SYSTEMS

Petitioner's Brief cites cases from four Circuit Courts of Appeals in support of the position that non-judicial foreclosure constitutes debt collection under the FDCPA. None of these decisions involves non-judicial foreclosure. Each of these cases is discussed very briefly below.

Piper v. Portnoff Law Associates, Ltd., 396 F.3d 227 (3d Cir. 2005) involved the collection of overdue water and sewer bills by obtaining and enforcing by execution an "in rem" judgment of a Pennsylvania court. The law of Pennsylvania allows for a money judgment to be taken in connection with such an action.[19] There is no provision under Pennsylvania law for a non-judicial foreclosure sale. The two other circuit decisions cited by Petitioner, *Kaymark v. Bank of Am., N.A.*, 783 F.3d 168 (3d Cir. 2015) and *McLaughlin v. Phelan Hallinan & Schmieg, LLP*, 756 F.3d 240 (3d Cir. 2014) also originated in Pennsylvania.

Kaltenbach v. Richards, 464 F.3d 524 (5th Cir. 2006) involved an "executory process foreclosure" on a mobile home. Under Louisiana law, a personal judgment may

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[19] 42 Pa.C.S.A. § 8103; The law of Pennsylvania allows a mortgagee to sue on a mortgage debt without foreclosing at all, or to foreclose by an in rem and action and obtain a deficiency judgment in that action. See, 22 Standard Pennsylvania Practice 2d § 121:3 (Westlaw 2014). See, e.g., *Fed. Home Loan Mortgage Corp. v. Arrott Associates, Ltd.*, 60 F.3d 1037 (3d Cir. 1995)

issue for any deficiency remaining after a foreclosure sale (i.e., a sheriff's sale).[20] Louisiana law does not prohibit seeking a money judgment against the consumer after the home was sold.

Wilson v. Draper & Goldberg, P.L.L.C., 443 F.3d 373 (4th Cir. 2006) originated in Maryland, where real property foreclosures are accomplished by judicial action, not by non-judicial means.[21] Deficiency judgments after the foreclosure sale are permitted in Maryland.[22]

In *Glazer v. Chase Home Fin. LLC,* 704 F.3d 453 (6th Cir. 2013) the gravamen of the claim was that a lawyer obtained a judicial decree of foreclosure by falsely representing that his client actually owned the secured note. In Ohio, a mortgagee has a choice of remedies. One is foreclosure under a power of sale which may be contained in the instrument. The other is by judicial action. In the case of a judicial foreclosure, such as that involved in *Glazer*, a deficiency judgment is available if the lender seeks one within two years after completion of the sale.[23] The opinion in *Glazer* rejects the view that mortgage foreclosure is not debt collection, and holds that "when a money judgment is sought against the debtor in connection with the foreclosure there *has been* debt collection, because there was an attempt to collect money. [*italics*

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[20] See, LSA-R.S. 13:4106; See, e.g., *Louisiana Nat. Bank v. Laborde,* 527 So. 2d 41 (La. Ct. App. 1988).

[21] MD Code, Real Property, § 7-105.1

[22] See generally, 15 M.L.E. Mortgages §§ 125, 197 (Westlaw 2014).

[23] See generally, 69 Ohio Jur. 3d Mortgages §§ 286 & 289 (Westlaw 2014).

in original]" *Glazer v. Chase Home Fin.*, supra., 704 F.3d at 460.

While the court in *Glazer* expresses its conclusions in sweeping statements, its articulated reasons for those conclusions demonstrate that it was thinking in terms of foreclosure law and procedures in Ohio and perhaps other similar jurisdictions within the Sixth Circuit, and that it was not thinking about trustee's sales in jurisdictions like California. For example, the Court says the following in reference to FDCPA section 1692f(6) which it says concerns "non-judicial repossession abuses": "Other than repossession agencies and their agents, we can think of no others whose only role in the collection process is the enforcement of security interests. A lawyer principally engaged in mortgage foreclosure does not meet this criteria, for he must communicate with the debtor regarding the debt during the foreclosure proceedings."[24]

It seems likely that the Sixth Circuit panel in *Glazer* could "think of no others whose only role in the collection process is the enforcement of security interests" because it was unfamiliar with non-judicial foreclosure procedures in California, where the trustee's role is confined to foreclosure and not debt collection.

As another example, the opinion in *Glazer* argues that foreclosure is the same as debt collection because "[a]s one commentator has observed, the existence of redemption rights and the potential for deficiency judgments demonstrate that the purpose of foreclosure is to obtain payment on the underlying home loan. Such remedies would not exist if foreclosure were not undertaken for the purpose of obtaining payment

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[24] *Glazer v. Chase Home Fin. LLC*, 704 F.3d 453, 464 (6th Cir. 2013).

. . . . Accordingly, mortgage foreclosure is debt collection under the FDCPA." *Glazer*, supra., 704 F.3d at 461. In contrast, in California there can be no deficiency judgment and there is no redemption right following a non-judicial foreclosure.

VI. IT IS IMPOSSIBLE TO DIRECTLY APPLY FDCPA TO THE CONDUCT OF A NON-JUDICIAL FORECLOSURE

Should this Court rule that California trustees are "debt collectors" subject to all of the requirements of the FDCPA, the result would not be simply that trustees would be required to send additional notices to consumers in addition to the statutory foreclosure notices. Imposition of the FDCPA on the non-judicial foreclosure process would prohibit trustees from following the procedures prescribed by law for a valid foreclosure.

FDCPA section 1692c(c) prohibits a debt collector from communicating further with a consumer if the consumer notifies the debt collector in writing, expressing the wish that the debt collector cease communication. Courts have held that written communications such as "kindly don't bother me anymore" are sufficient to legally prohibit further communication. *Isham v. Gurstel, Staloch & Chargo, P.A.*, 738 F. Supp. 2d 986, 994-95 (D. Ariz. 2010). Compliance by a trustee would deprive the consumer of critical notices such as the Notice of Trustee's Sale, advising the borrower of the date, time and place of the foreclosure sale and of the amount secured by the deed of trust, which the lender would be authorized to bid at the sale.

FDCPA section 1692c(b) generally prohibits a debt collector from communicating with third parties concerning the subject debt. The exceptions built in to the

FDCPA refer to judicial, not non-judicial, communications and remedies. Yet, as set forth above, the trustee is required by statute to record notices in the public records, and mail them to junior lienholders and others, and finally to post them on the property and publish them in the newspaper. These third party communications are vital to advertise the foreclosure, in part for the benefit of the consumer, as well as to warn those whose junior liens would be extinguished by the foreclosure. All of these communications would become illegal if the FDCPA were applied to non-judicial foreclosures.

These serious conflicts demonstrate that the provisions of the FDCPA, while sensible in the context of debt collection, are catastrophic and nonsensical when applied to non-judicial foreclosures. The Court should assume that such consequences were never intended by Congress. These conflicts are themselves strong guides to the interpretation of "debt collector" under the FDCPA.

CONCLUSION

The activities of trustees under deeds of trust are confined to specific actions set forth in detailed foreclosure statutes such as the California statutes discussed above. These communications are prescribed by laws that are adopted by each state to accommodate, in fact to accomplish, consumer protection. As an example, California non-judicial foreclosure statutes already provide a degree of disclosure and protection to consumers far beyond that contemplated by the FDCPA. A decision to graft the requirements of FDCPA onto that system would not aid consumers, would foster unnecessary litigation and raise issues which would be unsolvable without ignoring or re-writing key provisions of the FDCPA.

For all of these reasons, the judgment should be affirmed.

Respectfully submitted,

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November 14, 2018

APPENDIX

APPENDIX A

[Required to be attached to the Notice of Default by Cal.Civ. Code § 2923.3(c)(2)]

SUMMARY OF KEY INFORMATION

The attached notice of default was sent to [name of the trustor], in relation to [description of the property that secures the mortgage or deed of trust in default]. This property may be sold to satisfy your obligation and any other obligation secured by the deed of trust or mortgage that is in default. [Trustor] has, as described in the notice of default, breached the mortgage or deed of trust on the property described above.

IMPORTANT NOTICE: IF YOUR PROPERTY IS IN FORECLOSURE BECAUSE YOU ARE BEHIND IN YOUR PAYMENTS, IT MAY BE SOLD WITHOUT ANY COURT ACTION, and you may have the legal right to bring your account in good standing by paying all of your past due payments plus permitted costs and expenses within the time permitted by law for reinstatement of your account, which is normally five business days prior to the date set for the sale of your property. No sale date may be set until approximately 90 days from the date the attached notice of default may be recorded (which date of recordation appears on the notice).

This amount is _____ as of ___ (date) _____ and will increase until your account becomes current.

While your property is in foreclosure, you still must pay other obligations (such as insurance and taxes) required by your note and deed of trust or mortgage. If you fail to make future payments on the loan, pay taxes on the property, provide insurance on the

property, or pay other obligations as required in the note and deed of trust or mortgage, the beneficiary or mortgagee may insist that you do so in order to reinstate your account in good standing. In addition, the beneficiary or mortgagee may require as a condition to reinstatement that you provide reliable written evidence that you paid all senior liens, property taxes, and hazard insurance premiums.

Upon your written request, the beneficiary or mortgagee will give you a written itemization of the entire amount you must pay. You may not have to pay the entire unpaid portion of your account, even though full payment was demanded, but you must pay all amounts in default at the time payment is made. However, you and your beneficiary or mortgagee may mutually agree in writing prior to the time the notice of sale is posted (which may not be earlier than three months after this notice of default is recorded) to, among other things, (1) provide additional time in which to cure the default by transfer of the property or otherwise; or (2) establish a schedule of payments in order to cure your default; or both (1) and (2).

Following the expiration of the time period referred to in the first paragraph of this notice, unless the obligation being foreclosed upon or a separate written agreement between you and your creditor permits a longer period, you have only the legal right to stop the sale of your property by paying the entire amount demanded by your creditor.

To find out the amount you must pay, or to arrange for payment to stop the foreclosure, or if your property is in foreclosure for any other reason, contact:

_____

(Name of beneficiary or mortgagee)

_____

(Mailing address)

_____

(Telephone)

If you have any questions, you should contact a lawyer or the governmental agency which may have insured your loan.

Notwithstanding the fact that your property is in foreclosure, you may offer your property for sale, provided the sale is concluded prior to the conclusion of the foreclosure.

Remember, YOU MAY LOSE LEGAL RIGHTS IF YOU DO NOT TAKE PROMPT ACTION.

If you would like additional copies of this summary, you may obtain them by calling [insert telephone number].

APPENDIX B

[Required to be attached to the Notice of Default by Cal.Civ. Code § 2923.3(d)(2)]

SUMMARY OF KEY INFORMATION

The attached notice of sale was sent to [trustor], in relation to [description of the property that secures the mortgage or deed of trust in default].

YOU ARE IN DEFAULT UNDER A (Deed of trust or mortgage) DATED ____. UNLESS YOU TAKE ACTION TO PROTECT YOUR PROPERTY, IT MAY BE SOLD AT A PUBLIC SALE.

IF YOU NEED AN EXPLANATION OF THE NATURE OF THE PROCEEDING AGAINST YOU, YOU SHOULD CONTACT A LAWYER.

The total amount due in the notice of sale is ____.

Your property is scheduled to be sold on [insert date and time of sale] at [insert location of sale].

However, the sale date shown on the attached notice of sale may be postponed one or more times by the mortgagee, beneficiary, trustee, or a court, pursuant to Section 2924g of the California Civil Code. The law requires that information about trustee sale postponements be made av. ilable to you and to the public, as a courtesy to those not present at the sale. If you wish to learn whether your sale date has been postponed, and, if applicable, the rescheduled time and date for the sale of this property, you may call [telephone number for information regarding the trustee's sale] or visit this Internet Web site [Internet Web site address for information regarding the sale of this property], using the file number assigned to this case [case file number]. Information about postponements that are very short in duration or that occur close in time to the

scheduled sale may not immediately be reflected in the telephone information or on the Internet Web site. The best way to verify postponement information is to attend the scheduled sale.

If you would like additional copies of this summary, you may obtain them by calling [insert telephone number].

No. 17-1307

In The Supreme Court of the United States

DENNIS OBDUSKEY,

Petitioner,

v.

MCCARTHY & HOLTHUS LLP, ET AL.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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INTEREST OF *AMICUS CURIAE*[1]

USFN – America's Mortgage Banking Attorneys® ("USFN") is a national, not-for-profit association of law firms that specialize in matters of real estate finance. Founded in 1988, USFN consists of organizations that represent the nation's largest banks, mortgage lenders, mortgage servicing companies and government sponsored enterprises (such as Fannie Mae and Freddie Mac) in connection with foreclosure, bankruptcy, loan modifications and other workouts, inventoried properties, and litigation related to these areas. Membership also includes industry-affiliated suppliers of products and services.

USFN was established to promote competent, professional, and ethical representation among its membership and for the mortgage servicing industry, and to represent the collective interests of its membership to the mortgage servicing industry. As part of its mission, USFN also supports the interests of its members and the mortgage servicing industry through education, political and governmental reform, and by encouraging the use of industry standard procedures, technologies, and best practices.

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[1] Pursuant to Sup. Ct. R. 37.6, *amicus curiae* and its counsel state that none of the parties to this case, nor their counsel, authored this brief in whole or in part. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. Each of the parties has filed a blanket consent in connection with potential *amicus curie* briefs, copies of which are on file in the Clerk's Office. Accordingly, this brief is submitted upon the consent of all parties.

Among the services and products offered to the mortgage servicing industry by USFN are focused educational seminars, state-by-state desk guides and matrices that address specific and relevant topics and issues, the National Mortgage Servicer's Reference Directory, which is a one-of-a-kind compendium of industry information, training materials and videos, and in-house staff training programs for mortgage servicing companies.

USFN has a particular interest in this matter because the core business of its membership is the enforcement of security interests through judicial and non-judicial foreclosures in all fifty states, the District of Columbia and Puerto Rico. The Court's decision in this matter will affect key business processes for many USFN members and, accordingly, will have a great impact on USFN, its members and the banking and mortgage servicing clients of those members.

SUMMARY OF ARGUMENT

The plain text and legislative history of the FDCPA make clear that non-judicial foreclosures are not "debt collection" covered by the Act. The circuit courts that have held to the contrary each have fatal flaws in their logic, while the Ninth and Tenth Circuit decisions – including the decision below – are sound.

Moreover, the position advocated by Petitioner overlooks the critical distinction between *in personam* acts to collect debt and *in rem* or *quasi in rem* acts that

are solely against the collateralized property. This distinction is well-recognized in the context of bankruptcy law, where personal debt collection is barred post-discharge, but lien enforcement is specifically permitted.

In that regard, courts have identified "pressure" to repay a debt as the litmus test for whether the creditor's action affected the debtor's personal liability within the meaning of the Bankruptcy Code. The inquiry is objective; the question is whether the creditor's conduct had the practical, concrete effect of coercing payment of a discharged debt. This has been dubbed by the Tenth Circuit as the "Objective-Coercion Principle." *See In re Paul*, 534 F.3d 1303, 1308-09 (10th Cir. 2008).

Notwithstanding Congress's significant concern that a discharged debtor get bankruptcy's intended "fresh start," lien enforcement against collateral post-discharge is specifically permitted because it is recognized as a separate and distinct remedy from efforts to collect from the debtor personally.

It is no coincidence that the same Congress (the 95th) enacted both the Bankruptcy Code and the FDCPA. The text and legislative history of the FDCPA demonstrate that Congress intended the same objective test about the exertion of pressure to repay a debt (which violates the discharge injunction and qualifies as debt collection under the FDCPA) as opposed to mere *in rem* lien enforcement (which is permitted

post-bankruptcy discharge and is not debt collection under the FDCPA).

When considering non-judicial foreclosures through this lens, it is clear that Congress intended the same bright line that separates a bankruptcy discharge injunction violation from permitted lien enforcement to apply as the dividing line between FDCPA-covered debt collection and non-covered lien enforcement. The Court should recognize this bright line.

Finally, the State of Colorado has a sovereign interest in governing Colorado foreclosures. The FDCPA should not be construed to frustrate that interest, which is exactly what adopting Petitioner's position would do. If the FDCPA were held to apply in connection with Colorado's non-judicial foreclosure scheme, it would create an irreconcilable conflict between federal and state law. The mutual exclusivity of the two statutes would make it impossible for creditors and their counsel to comply with both. Such a decision would only serve to expand into Colorado, and other non-judicial foreclosure states, the same conflicts, challenges, and increased lawsuits that law firms and practitioners in Michigan have experienced as a result of *Glazer v. Chase Home Fin. LLC*, 704 F.3d 453 (6th Cir. 2013). *See Amicus* Brief of Michigan Creditors Bar Association, pp. 6-10.

The court of appeals correctly decided this issue and its judgment should be affirmed.

ARGUMENT

Enforcing a security instrument through a non-judicial foreclosure is not "debt collection" under the FDCPA

The Ninth Circuit in *Vien-Phuong Thi Ho v. Recon-Trust Co., NA*, 858 F.3d 568 (9th Cir.), *cert. denied*, 138 S. Ct. 504 (2017), and the Tenth Circuit below, correctly determined that a trustee or law firm whose primary business is the enforcement mortgage liens through foreclosure – rather than the collection of money – is not a "debt collector" pursuant to the Fair Debt Collections Practices Act, 15 U.S.C. §1692 *et seq*. ("FDCPA" or "the Act"). Consequently, the Ninth and Tenth Circuits concluded that non-judicial foreclosures are not "debt collection" subject to the FDCPA.

These decisions were correct and the Tenth Circuit should be affirmed for various reasons. First, the plain language of the statute dictates that result. *Ho*, 858 F.3d at 571-575; Pet. App. 5a-10a; Resp. Br. 16-24.

Additionally, to the extent the Court looks beyond the statutory text to examine Congressional intent through the legislative history, it is compelling that the law that was ultimately enacted was a compromise bill that specifically rejected the interpretation that Petitioner urges. Resp. Br. 25-27. It is further compelling that Congress discussed thirteen states that did not have debt collection regimes, which clearly indicates that mortgage foreclosures were not being contemplated because all fifty states have foreclosure statutes. Resp. Br. 26-27.

Contrary to the Ninth and Tenth Circuits, the Second, Third, Fourth and Sixth Circuits have all broadly held that foreclosures are "debt collection" under the Act, law firms and trustees pursuing such foreclosure are "debt collectors", and, as a result, are subject to the FDCPA. *See Cohen v. Rosicki, Rosicki & Associates, P.C.*, 897 F.3d 75 (2d Cir. 2018); *Kaymark v. Bank of Am., N.A.*, 783 F.3d 168 (3d Cir. 2015); *Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373 (4th Cir. 2006); *Glazer v. Chase Home Fin. LLC*, 704 F.3d 453 (6th Cir. 2013). Each of these decisions is flawed for various reasons, and none can withstand appropriate scrutiny in the face of the plain language of the statute.

In *Wilson*, the Fourth Circuit held that "foreclosure is a method of collecting a debt" and that holding to the contrary "would create an enormous loophole in the Act immunizing any debt from coverage if that debt happened to be secured by a real property interest and foreclosure proceedings were used to collect the debt." *Wilson*, 443 F.3d at 376. The Ninth Circuit's criticism of *Wilson* in *Ho* is well-founded insofar as the *Wilson* Court inserted its own policy view to avoid a perceived "loophole" rather than follow the actual text of the statute, which demands a different result. *Ho*, 858 F.3d at 572.

In *Cohen*, the Second Circuit determined that because the mortgagor has redemption rights in connection with foreclosure under New York law, and the mortgagee can later seek a deficiency judgment post-foreclosure, the "purpose of foreclosure is to obtain payment on the underlying loan, rather than mere

possession of the subject property." *Id.* This decision is flawed both because the court did no analysis as to whether the law firm defendant is a "debt collector" and because it looks to what might happen in the future (*i.e.*, redemption or a deficiency action) rather than what the specific acts or actions were at the time the FDCPA was allegedly violated. *Cohen*, 897 F.3d at 83. If the alleged violation occurred in the context of a foreclosure that did not include a demand for payment or deficiency judgment, it is merely the enforcement of a lien and not debt collection.

In *Glazer*, the Fourth Circuit held that "every mortgage foreclosure, judicial or otherwise, is undertaken for the very purpose of obtaining payment on the underlying debt, either by persuasion (*i.e.*, forcing a settlement) or compulsion (*i.e.*, obtaining a judgment of foreclosure, selling the house at auction, and applying the proceedings from the sale to pay down the outstanding debt)." *Glazer*, 704 F.3d at 461 (emphasis in original).

In *Kaymark*, the Third Circuit conducted no analysis into the "principal purpose" of the law firm defendant's business, but instead erroneously presumed it was a debt collector under to section 1692a(6). *See* generally, *Kaymark*, *supra*, 783 F.3d 168. However, pursuant to the plain language of the referenced section, "any business the principal purpose of which is the enforcement of security interests" is only a debt collector for purposes of section 1692f(6), which section is irrelevant to mortgage foreclosures. Rooted in that faulty premise, the remainder of the decision loses vitality.

Ultimately, each of these decisions are flawed either because they fail to give justice to the plain language of the statute, render statutory language superfluous or because they substitute their own policy views for those of Congress. On the other hand, the statutory interpretations of the Ninth and Tenth Circuits follow the statute's plain language, render no text superfluous, and make the most sense in connection with the legislative history.

In addition to the aforesaid textual and legislative arguments, there are two additional policy bases that support affirming the court below: 1) the distinction between *in personam* debt collection and *in rem* lien enforcement (including, by analogy, the application of that distinction in bankruptcy law); and 2) the right of Colorado to decide upon a foreclosure scheme without federal interference.

I. The well-established distinction between *in personam* debt collection and *in rem* lien enforcement is entrenched in bankruptcy law

There are various ways a secured creditor may enforce its rights when a debtor defaults in making payments, the primary two being *in personam* collection against the debtor and *in rem* or *quasi in rem* collection through liquidation of collateral. Perhaps nowhere in the law is this distinction more visible than in the bankruptcy context, specifically post-discharge.

The discharge of debt in a bankruptcy proceeding "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor."[2] 11 U.S.C. § 524(a)(2); *In re McLean*, 794 F.3d 1313, 1320 (11th Cir. 2015).

Notwithstanding a discharge of personal liability pursuant to 11 U.S.C. § 727, the right of a secured creditor to proceed against collateral *in rem* survives the discharge. *Johnson v. Home State Bank*, 501 U.S. 78, 80 (1991); *Long v. Bullard*, 117 U.S. 617, 620 (1886). *See also* 11 U.S.C. § 524(j).

> The creditor's surviving right to foreclose on the mortgage can be viewed as a "right to an equitable remedy" for the debtor's default on the underlying obligation. Thus, a bankruptcy discharge extinguishes only one mode of enforcing a claim – an in personam action – while leaving intact another – an in rem action.

Johnson v. Home State Bank, 501 U.S. at 78-79.

In this regard, the Bankruptcy Code[3] and case law interpreting it recognize the difference between debt collection, which would violate the discharge injunction provided for in 11 U.S.C. § 524, and lien enforcement, which is permitted post-discharge. The discharge injunction only applies to attempts to collect or recover

---

[2] This is commonly referred to as the "discharge injunction."

[3] The Bankruptcy Reform Act of 1978, 11 U.S.C. § 101 *et seq.*, is commonly referred to as the "Bankruptcy Code."

"any such debt *as a personal liability of the debtor.*'" *McLean*, 794 F.3d at 1320, quoting 11 U.S.C. § 524(a)(2) (emphasis in original).

"Given its important role in achieving the Bankruptcy Code's overall policy aim of giving a debtor a 'fresh start,' § 524(a)(2) (the discharge injunction) is an expansive provision that is sensitive to the diversity of ways a creditor might seek to collect a discharged debt." *McLean*, 794 F.3d at 1321; citing *In re Hardy*, 97 F.3d 1384, 1388-89 (11th Cir. 1996).

In *McLean*, the Eleventh Circuit determined that the fundamental underpinning of the discharge injunction is whether the debtor feels "pressured in any way to repay" a discharged debt.

> Legislative history demonstrates clearly that the purpose of the statute is to "eliminate any doubt concerning the effect of the discharge as a total prohibition on debt collection efforts." H.R. Rep. No. 95-595, at 365-66 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6321. And Congress meant no doubt whatsoever: "[Section 524] is intended to insure that once a debt is discharged, *the debtor will not be pressured in any way to repay it*. In effect, the discharge extinguishes the debt, and creditors may not attempt to avoid that." *Id.* at 366 (emphasis added). Incorporating this language into their decisions, other circuits have identified "pressure" to repay a debt as the litmus test for whether the action affected the debtor's personal liability within the meaning of § 524(a)(2). *See Solow v. Kalikow (In re Kalikow)*, 602 F.3d

> 82, 96 (2d Cir. 2010) ("[The creditors'] contact with [a third party] in no way 'pressured' [the debtor] to repay any of the discharged debts."); *Paul v. Iglehart (In re Paul)*, 534 F.3d 1303, 1313 (10th Cir. 2008).

McLean, 794 F.3d at 1321-22 (emphasis in original). That said, "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.") *McLean*, 794 F.3d at 1322, citing *Green v. Welsh*, 956 F.2d 30, 33 (2d Cir. 1992) (collecting cases from other circuits).

The inquiry is objective; the question is whether the creditor's conduct had the practical, concrete effect of coercing payment of a discharged debt. This has been dubbed by the Tenth Circuit as the "Objective-Coercion Principle." *See Paul*, 534 F.3d at 1308-09. Notwithstanding Congress's significant concern that a discharged debtor get bankruptcy's intended "fresh start," lien enforcement against collateral post-discharge is specifically permitted because it is recognized as separate and distinct from efforts to collect from the debtor personally.

In other words, even in a statutory scheme so concerned with "pressure" on a debtor to repay debt, the Bankruptcy Code intentionally permits foreclosure post-discharge and does not consider foreclosure to exert pressure on a debtor to personally repay the debt. Instead, it recognizes that foreclosure is merely the pursuit of *in rem* relief solely against the property and, in the pursuit of that *in rem* relief, "contact with

the Debtor is not per se prohibited by the discharge injunction. Rather, demands for payment of discharged debts are prohibited." *Best v. Nationstar Mortgage LLC*, 540 B.R. 1, 10 (B.A.P. 1st Cir. 2015); quoting *In re Brown*, 481 B.R. 351, 358 n. 10 (Bankr. W.D. Pa. 2012).

In *Best*, the Bankruptcy Appellate Panel for the First Circuit observed that "[w]hen a secured creditor retains a lien on the debtor's property after the discharge, courts have held that it is not *per se* improper for the secured creditor to contact a debtor to send payment coupons, determine whether payments will be made on the secured debt, or inform the debtor of a possible foreclosure or repossession, as long as it is clear the creditor is not attempting to collect the debt as a personal liability." *Best*, 540 B.R. at 10-11; quoting *In re Culpepper*, 481 B.R. 650, 658 (Bankr. D. Or. 2012) (citing 4 *Collier on Bankruptcy* ¶ 524.02[2][b]).

"Statements of an informational nature, even if they include a payoff amount, are not generally actionable if they do not demand payment." *Best*, 540 B.R. at 11; citing *Brown*, 481 B.R. at 359 (general informational letters that included a payoff amount but did not demand payment were not violations of the discharge injunction) (citing cases). And when the statements indicate they are for informational purposes only, "[e]ven a hypothetical unsophisticated consumer should understand after reading these disclaimers that the monthly statements are not demands for payment. *In re Lemieux*, 520 B.R. 361, 366 (Bankr. D. Mass. 2014).

Through this comparison of the FDCPA and the Bankruptcy Code, it becomes clear that Congress intended the FDCPA to apply only to *in personam* collections that would be barred by the discharge injunction in bankruptcy, but not *in rem* or *quasi in rem* foreclosure actions that would not be barred post-bankruptcy discharge. In other words, the same bright line that separates violations of the discharge injunction from permitted post-discharge lien enforcement also separates debt collection covered by the FDCPA from lien enforcement that is not covered.[4]

It is worth noting that the Bankruptcy Code (enacted November 6, 1978) and the FDCPA (enacted September 20, 1977) were both the product of the 95th Congress and enacted less than 14 months apart. It is unrealistic to think that Congress so clearly determined that foreclosure is neither the collection of debt personally nor an exertion of pressure upon a debtor to pay for purposes of the Bankruptcy Code, if it was not already that same Congress's view that lien enforcement is different than debt collection for purposes of the FDCPA. Rather, "Congress is presumed to enact legislation with knowledge of the law and a newly-enacted statute is presumed to be harmonious with existing law and judicial concepts." *Farina v. Nokia Inc.*, 625 F.3d 97, 112 (3d Cir. 2010).

Adoption of the Petitioner's logic – that every foreclosure is tantamount to a demand for payment –

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[4] *See* 1a, *infra*, a chart created by *amicus* to assist in visualization of the bright line that Congress intended.

would mean that every foreclosure post-bankruptcy discharge violates the discharge injunction. Obviously, this is not the case because well-settled law specifically allows for foreclosure actions to be brought post-bankruptcy discharge, and courts have rejected the notion that foreclosure in-and-of itself constitutes a demand for payment of money from the debtor. *See, e.g.*, *McLean*, 794 F.3d at 1321–22.

Further contrary to Petitioner's position, the required Colorado foreclosure notices cannot objectively be said to coerce payment. While they may occasionally lead to payment at the debtor's initiative, the notices are not sent for the purpose of eliciting such payment. Rather, these notices are informational only, *see Best, supra*, 540 B.R. at 11; citing *Brown*, 481 B.R. at 359, designed to inform the mortgagor of the impending foreclosure occasioned by the default.

Moreover, Petitioner's criticism of the Ninth Circuit, *see* Pet. Br. 20, that it does not matter whether the money is coming from the consumer or the property, is misplaced in light of the bankruptcy discharge scenario. Rather, it absolutely matters where the money is coming from. If the money is sought from the consumer it violates the discharge injunction. However, if the money would only be coming out of liquidation of the property, it does not. Similarly, for FDCPA purposes, the Act only applies when collection is sought from the consumer personally, and not solely from collateralized property.

Accordingly, the more sound logic – which is supported both in the text of the FDCPA and upon consideration of the legislative history – is the recognition of a bright line between acts and actions that seek to hold a consumer personally liable for a debt and those that merely seek to enforce a lien on collateral. This case, and the current circuit split, illustrate that a bright line is preferable. Because of the legal concepts surrounding bankruptcy and the discharge injunction, and given the text and history of the FDCPA, it is evident that Congress intended the bright line to be that the Act does not apply to acts or actions that are permitted post-bankruptcy discharge.

A. The Court should recognize the bright-line distinction between debt collection and lien enforcement that Congress intended

Both the text and legislative history of the FDCPA make clear that Congress never intended the Act to apply in connection with the mere enforcement of a security instrument. The bright-line distinction between acts and actions that solely seek enforcement of a security instrument versus the pursuit of other debt collection remedies (*i.e.*, suit on note, foreclosure that includes demand for payment or any other payment demand, foreclosure that also seeks combined money judgment, post-foreclosure deficiency action) has never been specifically annunciated by the Court, although it is supported by the statutory text and legislative history. *See* pp. 5-8, *supra*.

Not coincidentally, this bright line mirrors remedies that are permitted under bankruptcy law post-discharge. Because a suit on note, foreclosure that includes demand for payment (or any other demand for payment), foreclosure that also seeks combined money judgment and a separate post-foreclosure deficiency action all have an aspect of personal debt collection, each is barred by the discharge injunction. However, the mere enforcement of a pre-petition security instrument, with no other collection efforts, is specifically permitted post-bankruptcy discharge.

We do not ask the Court to *create* a bright line – Congress has already done that. Rather, we urge the Court to recognize that bright line in the way that Congress intended. By doing so, lower courts, consumers, foreclosure and bankruptcy practitioners, banks and mortgage servicing companies will all have a clear understanding that the same bright line that applies post-bankruptcy in connection with the discharge injunction applies to foreclosures under the FDCPA. Where the action is merely to foreclose the security interest, with no personal collection efforts or exposure, the activity is lien enforcement and not debt collection, and therefore not covered by the FDCPA.

B. Petitioner also overlooks the related distinction between the note evidencing the debt and the security instrument that provides collateral

The primary instruments that memorialize a residential mortgage loan – the promissory note and the deed of trust[6] securing such a note – are two separate instruments, each providing distinct obligations of a mortgagor and different remedies upon default. *Martins v. BAC Home Loans Servicing, L.P.*, 722 F.3d 249, 255 (5th Cir. 2013) ("courts have 'rejected the argument that a note and its security are inseparable by recognizing that the note and the deed-of-trust lien afford distinct remedies on separate obligations'"); *see also* 55 Am. Jur. 2d Mortgages § 463 (a security interest in property and the underlying debt it secures are not the same).

A suit for breach of a promissory note is an action *in personam*, by which "the creditor seeks to recover money from the debtor." *United States v. Begin*, 160 F.3d 1319, 1321 (11th Cir. 1998), citing *United States v. Alvarado*, 5 F.3d 1425, 1428 (11th Cir. 1993). Conversely, the non-judicial enforcement of a security instrument does not involve attempts to collect money.

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[6] In non-judicial foreclosure states, the security instrument is usually referred to as a "deed of trust" or "security deed" while judicial foreclosure states typically refer to the instrument by its traditional name, "mortgage." While there are technical distinctions between a deed of trust, security deed and a mortgage, those distinctions are not relevant for our purposes, and thus we use the phrases interchangeably to describe a voluntary lien granted to secure repayment of a mortgage loan.

Rather, the mere enforcement of a security instrument securing real property is instead an action *in rem*,[6] seeking liquidation of the collateral through the transfer of title. *See Johnson v. Home State Bank*, 501 U.S. 78, 84 (1991) ("a bankruptcy discharge extinguishes only one mode of enforcing a claim – namely, an action against the debtor *in personam* – while leaving intact another – namely, an action against the debtor *in rem*."). *See* pp. 8-15, *supra*.

A foreclosure that does not seek a combined money judgment[7] therefore affords relief only as to the secured property, not as to the mortgagor. *ABN AMRO*

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[6] As opposed to purely "*in rem*" some states consider their mortgage foreclosures to be "*quasi in rem*" because personal service of process is required and/or because a right to seek a deficiency on the note may survive the foreclosure. *See, e.g., Turczak v. First Am. Bank & Lebow*, 997 N.E.2d 996, 1002 (Ill. App. Ct. 2013) ("while *in rem* differs from *quasi in rem*, both are alternatives to *in personam* jurisdiction. Foreclosure suits on property, a *quasi in rem* proceeding, applies a legally distinct remedy from an *in personam* proceeding on a promissory note"). However, the mere right to later or separately seek a deficiency judgment does not transmorph the foreclosure action itself into debt collection, which is the flaw in the Second Circuit's *Cohen* decision. *See* pp. 6-7, *supra*. For purposes of this brief, we use the phrases "*in rem*" and "*quasi in rem*" interchangeably, both meaning a foreclosure action against the property only that does not seek a money judgment; and both *in rem* and *quasi in rem* meaning not *in personam*.

[7] In some states, judicial foreclosure allows the creditor to seek either the sale of the collateral only or a combined judgment that directs sale of the collateral and simultaneously awards a money judgment. *See, e.g.*, Fla. Stat. § 702.06. We acknowledge that certain types of judicial foreclosure (*i.e.*, those where payment of money or a deficiency judgment is sought) may qualify as debt collection.

Mortg. Group, Inc. v. McGahan, 237 Ill. 2d 526, 534-537 (2010). "A judgment of foreclosure is a judgment *in rem* or *quasi in rem* that directs the sale of the mortgaged property to satisfy the mortgagee's lien." [internal citations omitted] *Aluia v. Dyck-O'Neal, Inc.*, 205 So. 3d 768, 773 (Fla. Ct. App. 2d 2016). Such a foreclosure is not, and cannot be properly characterized as an *in personam* action against a person to collect a debt.[8]

Accordingly, the Petitioner's logic is consistently flawed because it overlooks the distinction between the note and the mortgage, the difference between the pursuit of *in rem* and *in personam* remedies, and, consequently, the bright line separating debt collection and lien enforcement.

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[8] While most foreclosures result from a monetary default, many also result from non-monetary defaults, which further illustrates the distinction between personal debt collection on the note and mere lien enforcement. Examples of non-monetary defaults include: providing materially false, misleading or inaccurate information in connection with the loan application process, default on a senior lien that could impair the creditor's lien, failure to pay taxes or homeowners' association dues, failure to maintain hazard or flood insurance, and the existence of any civil or criminal forfeiture action that could impair the creditor's interest. *See* relevant portions of Fannie Mae/Freddie Mac Uniform Colorado Deed of Trust, 12a. Non-monetary defaults give rise to the same exact remedy as a monetary default, namely, non-judicial foreclosure of the property – additional demonstration that non-judicial foreclosure has nothing to do with the collection of money.

II. The FDCPA should not be construed to interfere with state regulation of foreclosures

Foreclosure is an inherently state court matter. To apply the FDCPA to the Colorado foreclosure process would preempt a foreclosure process developed by the state without clear legislative intent to do so. *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994). Providing clear title to real property and therefore allowing the free transfer of real property is a critical state law concern. As the Court has previously stated: " 'the general welfare of society is involved in the security of the titles to real estate' and the power to ensure that security 'inheres in the very nature of [state] government.' " *Id. at 544, citing American Land Co. v. Zeiss*, 219 U.S. 47, 60 (1911).

The Colorado state foreclosure process, if correctly followed, provides clear title upon issuance of the Public Trustee's Deed to the successful bidder at the foreclosure sale or the redeeming party. *See, e.g.*, Colo. Rev. Stat. §§ 38-38-501 and 504.

If the FDCPA is held applicable to non-judicial foreclosure processes, and portions of such processes are therefore determined to violate the FDCPA, states would be left with two equally unacceptable options to enforce *in rem* rights.[9] While the Colorado process has some FDCPA protections built in due to the fact that

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[9] This is the same conflict that our colleagues from the Michigan Creditors Bar Association described in their *amicus* brief about the impact of the Sixth Circuit's *Glazer* decision to the Michigan foreclosure practice.

the trustee is a public official and therefore has government immunity,[10] Colorado is the only state which uses the public trustee system. All other non-judicial foreclosure states use "private" trustees and would therefore not offer the same governmental or quasi-governmental immunity. If the FDCPA is held to apply to trustee foreclosures, the states would be left with two equally unacceptable options. The first requires the state legislatures to re-write state law to remove critical debtor protections and notices to third parties who are directly affected by the foreclosure. The second is to permit non-judicial foreclosures to proceed with the understanding that the trustee, trustee's attorneys, the creditor, and the creditor's attorneys are exposing themselves to liability under the FDCPA.

If the FDCPA is held applicable to non-judicial foreclosure processes, and portions of such processes are therefore determined to violate the FDCPA, state legislatures across the country would be required to amend their foreclosure laws to remove all notices and publications to third parties and all notices to the debtor once the debtor has obtained counsel or requests that the creditor cease and desist from further communication. 15 U.S.C. § 1692c(b) and §1692c(a)(2). These notices are intended to provide debtors with information regarding their options to avoid foreclosure as well as their rights with regard to the foreclosure. *See, e.g.*, Colo. Rev. Stat. §§ 38-38-102.5, 103, 103.1, 104, and Colo. R. Civ. P. 120. Certain of these notices are

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[10] *See* Colorado Governmental Immunity Act, Colo. Rev. Stat. §§ 24-10-101 *et seq*.

also intended to protect the rights of others including secured creditors, such as homeowner's associations, junior mortgage holders and judgment creditors. *See, e.g.*, Colo. Rev. Stat. §§ 38-38-102, 103, 104-106. A holding that the FDCPA is applicable to non-judicial foreclosures would invalidate significant portions of the well-established non-judicial foreclosure process in Colorado and many other states, a prospect that is deeply troubling.

Alternatively, states may elect not to amend their foreclosure laws, which would expose attorneys and trustees to FDCPA violations merely for electing to use their state's non-judicial foreclosure process. This would require, for example, third-party communications regarding the underlying debt secured by the property, a violation of the FDCPA.[11] This places them in a quintessential "Catch-22" between complying with conflicting state and federal laws, each of which is intended to protect consumers. This raises an especially difficult issue in Colorado, where the foreclosing entity is a public official. The state would be unable to proceed with its Public Trustee foreclosure system in light of clear conflicts with federal law.

Both of these options would also have another unintended but grave consequence. To the extent Colorado, and other states, determine that their state law

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[11] This is the current situation in Colorado as evidenced in the underlying case. In attempting to comply with both state law and the FDCPA, the attorneys placed themselves at risk of litigation brought by debtors arguing that the notices required by state law violate the FDCPA.

processes violate the FDCPA, creditors would be forced to seek *in rem* relief through the court system using the judicial foreclosure process as an alternative to the non-judicial process. The courts in non-judicial states would be overrun with judicial foreclosures, for which the states are not prepared and ill-equipped to handle.

There exists an inherent conflict between the FDCPA and Colorado foreclosure law

The FDCPA bars several types of communication that are in direct conflict with the Colorado foreclosure process.[12] Examples include the FDCPA's bar on communication with third parties by debt collectors "in connection with the collection of any debt," 15 U.S.C. § 1692c(b), as well as any direct communication "in connection with the collection of any debt" with a debtor who is represented by counsel. 15 U.S.C. § 1692c(a). Further, a debt collector must cease communication "if a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer" 15 U.S.C. § 1692c(c).[13]

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[12] *See* 2a-11a for ten individual examples of direct conflicts between the FDCPA and Colorado foreclosure requirements.

[13] 15 U.S.C. § 1692c(c) provides limited exceptions to the requirement that communication must cease, including (1) to advise the consumer that the debt collector's further efforts are being terminated; (2) to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or (3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.

Colorado foreclosure law is at odds with the FDCPA because state law requires in several instances not only communication with the debtor, but also, communication with third parties regarding the foreclosure. If a non-judicial foreclosure is considered to be debt collection, then various state-mandated communications regarding the non-judicial foreclosure would be in conflict with the FDCPA and each communication would be in violation of 15 U.S.C. § 1692c.

1. Pre-Commencement

Colorado's foreclosure statutes require two notices be sent to the debtor pre-foreclosure. The first notice provides the debtor with the telephone number of the Colorado foreclosure hotline, the direct telephone number of the creditor's loss mitigation representative and a statement that it is illegal for a foreclosure consultant to charge an up-front fee or deposit to the debtor for services related to the foreclosure. Colo. Rev. Stat. § 38-38-102.5(2). This first step in the foreclosure process is typically completed by the holder or servicer of the indebtedness. The requirement that this letter be sent is intended to assist the debtor in avoiding foreclosure. In some instances, as in this case, the statutorily required letter is sent by the attorney for the creditor.

A second notice is required to be sent by the servicer, providing the debtor with contact information for a designated single point of contact whose primary purpose is to provide loss mitigation information to the

debtor and coordinate loss mitigation efforts between the debtor and the servicer.[14] Colo. Rev. Stat. § 38-38-103.1. This step is also intended to assist the debtor in avoiding foreclosure.

If non-judicial foreclosures are considered to be debt collection, each of these statutorily required communications would be in violation of 15 U.S.C. § 1692c(a) and § 1692c(c) in the instances where the debtor is known to have counsel or has requested that the creditor cease communication. While the purpose and intent of the FDCPA and the Colorado foreclosure statutes are aligned insofar as both intend to protect consumers, federal preemption of a state statute designed to provide information regarding foreclosure prevention frustrates that purpose.

2. Commencement, Notices and Publication

Following the pre-foreclosure notices, to commence a Colorado non-judicial foreclosure, the creditor or its attorney must send a package ("PT Package") to the Public Trustee in the county where the property is located. The Public Trustee uses the information and forms in the package to communicate with the debtor and all necessary parties regarding the impending foreclosure. One of the forms included in the PT Package is the Notice of Election and Demand ("NED") which includes information necessary to identify the

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[14] Small servicers are exempt from this requirement. Colo. Rev. Stat. § 38-38-103.1(3).

creditor and the debtor, the principal amount of the debt underlying the secured claim, and the nature of the default under the security instrument, and the Property to be foreclosed. Colo. Rev. Stat. §§ 38-38-101(1) and (4). The information in the NED is required to be disclosed to third parties through publication and mailing, as set forth below.

The PT Package also includes a combined notice ("Combined Notice"). In addition to other information, the Combined Notice includes everything in the NED, along with the place, date, and time set for the foreclosure sale. The PT Package includes a mailing list ("Mailing List") compiled from real property records and the creditor's own records. Colo. Rev. Stat. §§ 38-38-101(d) and 104. The Mailing List includes all persons or entities with a recorded interest in the property as of the time the PT Package is prepared, as well as all addresses for the debtors and their successors in interest that are in the holder's records. *Id.* The Public Trustee is required to send the Combined Notice to all parties on the Mailing List and to publish a version of it, as set forth below.

Upon receipt of the PT Package, the Public Trustee must review the documents, and if complete, record the NED in the office of the county clerk and recorder. Colo. Rev. Stat. § 38-38-102. At the time of recording the NED, the Public Trustee sets the first scheduled foreclosure sale date. Recording the NED is the first act by the Public Trustee to communicate with the debtor and third parties regarding the impending foreclosure.

The act of recording the NED in the public records conflicts directly with the language of 15 U.S.C. § 1692c(b).[15] The purpose of recording the NED in the real property records is to provide notice to all interested parties of the impending foreclosure with specific details as to the debtor, the underlying debt and the nature of the default.

Within twenty (20) calendar days of recording the NED, the Public Trustee must mail the Combined Notice to all persons and entities on the Mailing List. Colo. Rev. Stat. § 38-38-103(1)(a). The Combined Notice includes all of the information in the NED as well as information regarding rights to cure or redeem the debt. It also must include the time, date and place of sale and a statement regarding the debtor's right to pursue legal action if the debtor believes there have been certain improprieties in the foreclosure process. Colo. Rev. Stat. §§ 38-38-103(1)(a) and (4). This is another required act of communicating specific information regarding the foreclosure action to the debtor and third parties.

The requirement to mail the Combined Notice to all parties on the Mailing List conflicts directly with the provisions of 15 U.S.C. §§ 1692c(a), (b) and (c).

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[15] Because the Public Trustee is a state official, the trustee arguably falls into an FDCPA exception. However, the "public trustee" concept is unique to Colorado, and the act of recording required notices in all other non-judicial foreclosure states would violate 15 U.S.C. § 1692c(b), if it is found to apply.

Next, prior to the first scheduled foreclosure sale date, the Public Trustee must publish in a newspaper of general circulation a shortened version of the Combined Notice[16] for four weeks. Colo. Rev. Stat. § 38-38-103(5). This publication is another act in direct conflict with the provisions of 15 U.S.C. § 1692c(b).

Once the foreclosure is commenced through the Public Trustee, the Public Trustee handles all aspects of the foreclosure except the Rule 120 proceeding described below. The Public Trustee performs all of the following related to the foreclosure sale: providing cure and redemption figures upon request, accepting pre-sale funds for cure and payoff, setting and continuing sale dates, conducting the foreclosure sale, accepting bids at sale, and managing post-sale redemption rights and funds. Colo. Rev. Stat. §§ 38-38-102-505. The Public Trustee communicates with the debtor, junior lienholders, and any other interested parties regarding the extent of the defaulted debt triggering the right to foreclose and the foreclosure process.

Each act necessary to commence the foreclosure conflicts directly with FDCPA requirements prohibiting contact with third parties and prohibiting direct communication with the debtor if he or she is represented by counsel or has requested a cease in communication. From a policy perspective, if non-judicial

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[16] The published Combined Notice is somewhat shorter as it removes the intent to cure and redeem language and also removes the statement regarding the debtor's rights to file a complaint with the Bureau of Financial Consumer Protection or the Colorado Attorney General.

foreclosures are held to be governed by the FDCPA, the existing foreclosure system in Colorado would cease to operate. All of the notices required to inform the debtors and other interested parties of the critical information regarding the foreclosure, and their rights in relationship to the foreclosure, would be prohibited.

3. Order Authorizing Sale

The Colorado non-judicial foreclosure process requires that the creditor receive an order from the district court authorizing the Public Trustee to conduct the non-judicial foreclosure sale. Colo. Rev. Stat. § 38-38-105. The order is obtained through an expedited process pursuant to Colorado Rule of Civil Procedure 120 ("Rule 120") which requires that the creditor provide notice of the hearing to all parties "whose interest in the real property may otherwise be affected by the foreclosure" Colo. R. Civ. P. 120(a)(1)(B)(v). The notice must contain a description of the deed of trust being foreclosed as well as the facts asserted in the motion to support the claim of default. Colo. R. Civ. P. 120 (b)(1). In addition to mailing the Rule 120 notice of hearing to all parties whose interests may be affected by the foreclosure, Colo. R. Civ. P. 120(b)(4)(A), the notice is posted at the courthouse. Colo. R. Civ. P. 120(b)(4)(B). A copy of the notice must also be posted in a conspicuous place on the subject property. Colo. R. Civ. P. 120(b)(4)(C).[17]

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[17] Colo. R. Civ. P. 120(b)(4)(C) applies to only foreclosures of residential real property.

The requirements of Rule 120 are in direct conflict with FDCPA communication restrictions. The notice of hearing must provide the factual basis for the assertion of the claim of default, yet the FDCPA prohibits communication with third parties about the debt without the written permission of the consumer. The notice is posted at the property and the courthouse for potentially anyone to read. The Rule 120 process was specifically designed to provide additional protections to the debtor by providing due process before the foreclosure of his or her property and to ensure that appropriate public notice is given. However, if non-judicial foreclosures are determined to be collection of debt, it would be impossible to process any foreclosure without directly violating the FDCPA. The FDCPA and Rule 120 cannot be read in concert.

Additionally, the FDCPA prohibits communication with a debtor who is represented by counsel. 15 U.S.C. § 1692c(a)(2). Colorado law specifically requires notice of the Rule 120 motion to be mailed to the grantor of the deed of trust and the current owner of the property. The notice is also required to be posted conspicuously on the subject property. Colo. R. Civ. P. 120 *supra*. Both of these requirements are in direct conflict with the FDCPA prohibition of communicating with the consumer if that consumer is represented by counsel. Again, the two statutes cannot be read in harmony. If preemption resolves the conflict, then the non-judicial foreclosure process in Colorado – and many, if not all other non-judicial states – would become extinct. Failure to comply with Rule 120 results in denial of the

order authorizing sale, which, in turn, means that the Public Trustee cannot conduct the non-judicial foreclosure sale. Colo. Rev. Stat. § 38-38-105. Thus, in order to comply with the FDCPA, the Colorado foreclosure process cannot be maintained, and would need to be replaced either by new legislation or a purely judicial foreclosure process.

4. The Sale

Forty-eight hours prior to sale, the foreclosing creditor must submit its credit bid to the Public Trustee, who is required to post for public viewing the bid and any amended bids. Colo. Rev. Stat. § 38-38-106. The publication of the bid provides to any interested party the information necessary to competitively bid at sale. Publication of the bid also benefits the debtor by increasing the likelihood of competitive bidding at sale. Any increase in the amount received at foreclosure sale decreases the potential deficiency that could be collected by the creditor in a separate action on the note.

Following the sale, the Public Trustee issues and records a certificate of purchase identifying the successful bidder at the foreclosure sale. After all redemption rights have expired, the Public Trustee issues and records a Public Trustee's Deed transferring title to the new owner of the Property. This is the final act of public communication regarding the foreclosure performed by the Public Trustee. The Public Trustee's Deed identifies the default that caused the foreclosure

and the amount paid at foreclosure sale for the property, as well as the new owner of the property.

The one power the Public Trustee does not have is the power to render a judgment on the debt owing by the debtor. Any action on the debt must be conducted through a separate judicial action. The Public Trustee can only provide *in rem* relief by issuing a deed to the successful bidder at sale or the last redeeming party. Accordingly, Colorado's non-judicial foreclosure process is not debt collection governed by the FDCPA. To hold otherwise would invalidate Colorado law, contrary to broad policy considerations supporting each state's autonomy to control property rights. *BFP*, 511 U.S. at 544.

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The plain text and legislative history of the FDCPA, along with various policy considerations, make clear that non-judicial foreclosures are not "debt collection" covered by the Act. Nor are law firms or trustees whose principal purpose is pursuing such foreclosures "debt collectors" under the FDCPA.

The Court should resolve the current circuit split by recognizing the bright line between personal debt collection and mere lien enforcement. This is what Congress intended in connection with the FDCPA, and already well-accepted in the post-bankruptcy discharge context. The judgment of the court of appeals should be affirmed.

CONCLUSION

For the reasons set forth herein, the judgment of the court of appeals should be affirmed.

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November 2018